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File No. S. Bel 4/1,

Examined

Legal DEPARTMENT

A BRANCH

Subject :— - Civil Suit No. 288 of 1946 -

1) Shankar Siddappa Kore ---Plff.

Versus

1) The Central Govt. of India ---Defts.

Claim for Court-fee ~~Rs.....~~ Rs. 230/-

Claim for jurisdiction ... Rs. 9,586/14/-

T.A. No. 175/47

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File No. Suit Belgaum 6/44

Std. Sectt. Slip 24-B

S-Bel 6/44

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Regular Civil Suit No. 288 of 1945.

In the Court of the Civil Judge (Senior Division)

At Belgaum.

1. Shankar Siddappa Kore, age 35, caste Lingayat occupation trader & Agriculturist residing at Ankli, Taluka Chikodi, District Belgaum. } Plff.

Against.

1. The Central Government of India, -- Delhi. } Deft.

Claim for Court fee:- Rs 230/-

for Jurisdiction:- Rs 9566/14/

Plaintiff sues as follows:-

1. The Plaintiff, being a Commission agent of various customers in British India, Native States and Goa, received orders from merchants in Goa in about April or May 1943 for sending chewing tobacco to Goa via Castle Rock. He therefore applied to the Assistant Collector, Central Excises, Kolhapur Division for transport permits under Rule 14 of the Tobacco (Excise Duty) Rules 1943 in respect of the consignment of chewing tobacco, which the Plaintiff purchased as Commission Agent for the said Goa merchants, and the Sub-Inspector of Ankli, Central Excises, (whose designation has been since changed as Ranger Officer, Ankli Range, Central Excises) accordingly served on the Plaintiff three T. D. 1 notices bearing Serial Nos. 18744, 18745 and 18746 dated respectively 10-5-1943, 12-5-1943 & 12-5-1943 for payment of duty payable under the Tobacco (Excise Duty) Act 1943 after getting three tobacco consignments of 9861 lbs, 10790 lbs & 9931 lbs. weighed in his presence on the above said

dates, which, after an examination of the variety ~~of~~ in each of the said consignments at the time of weighing, was accepted by the said Sub-Inspector as a variety for chewing purposes, denoting in the said notices the amount of duty at Rs.616-5-0, Rs. 674-6-0 and Rs. 620-11-0 respectively and the variety as chewing tobacco and informing the plaintiff that on -- production of Treasury Receipts in token of the payment of the said duty, into the Chikodi Sub-Treasury within 10 days thereof, the plaintiff should apply for permits to remove the goods presumably as provided in Rule 14 of the Tobacco (Excise Duty) Rules 1943. Plaintiff accordingly paid the said amounts into the Chikodi Sub-Treasury respectively on 20-5-1943, 22-5-1943 and 22-5-1943 and on application made by the Plaintiff to the Sub-Inspector Ankli, for transport permits, he granted three permits in Form T.P.1, authorising the plaintiff to transport the three consignments to Goa ~~Castle~~ Rock. These three consignments were accordingly transported to Goa ~~Castle~~ Rock about the end of July 1943.

2. When the same officer (Sub-Inspector of Ankli) purported to issue again on 24-8-1943 three notices in Form T.P. 1 in respect of the three abovesaid consignments demanding payment of "differential duty at the rate of 5 annas per lb" amounting respectively to Rs. 3081-9-0, Rs. 3171-14-0 and -- Rs. 3103-7-0 mentioning in the ~~Assistant~~ Assessment particulars against ~~the~~ the Sugar variety as "chewing exported to Goa." Plaintiff then made a reference to the Inspector of Central Excises, Circle Chikodi in his letter dated 31-8-1943 asking him under what authority, the three ~~Nos~~ consignments which were properly allowed to be transported to Goa under legal permits were liable to excess duty and informed him that until and unless this was made clear, plaintiff was not willing to pay the so called differential duty. To this the said Officer avoided giving a proper reply in writing ~~through~~ though the Sub-Inspector, Ankali orally informed the plaintiff that the said three -- consignments were liable to duty at six annas per lb because

of their transport to Goa as per Circular issued to all tobacco Officers by the Central Board of Revenue in July 19 The said circular is not only illegal and ultra vires but could not at any rate be given retrospective effect as the three consignments in question had been transported to Goa long before the receipt of the said circular. Then as the Circle Officer Chikodi issued a notice dated 22-3-1944 to the plaintiff requesting the plaintiff to pay the so called -- differential duty, he made an application dated 2nd April 1944 to the Collector of Salt Revenue Bombay through the -- Range Officer, Ankli requesting him not to levy the duty that but that application was not forwarded to the Collector at all. Then the plaintiff made an application dated 1-5-1944 to the Collector of Salt Revenue directly again, through the plaintiff's advocate bringing to his notice all the points in regard to the illegality of the demand. That application was sent to the Additional Collector for disposal who intimated to the Plaintiff's Advocate in his communication No. T.Ex. 13/243 dated the 10th June 1944 that the differential duty at 5 annas per lb was payable by the Plaintiff in respect of the abovesaid 3 consignments as the duty of one anna per lb originally levied was short-levied by the Range Officer, Ankli through misdeclaration on the part of the Plaintiff, that Rule 79 of the Tobacco (Excise Duty) Rules applied, that as the Plaintiff failed to pay the differential duty, he committed a breach of the said rule which is an offence punishable under Rule 82 of the said Rules read with S. 10 of the Tobacco (Excise Duty) Act 1943 and that the Plff's application dated 1-5-1944 could not be considered unless the duty of Rs. 9556-14-0 was paid by the Plaintiff in -- accordance with S. 189 of the Sea Customs Act 1878. Then the Plaintiff submitted a reply through his Advocate to the Additional Collector in his letter dated 16th June 1944 that Rule 79 had no application in regard to the said three

consignments of chewing tobacco as that rule does not cover cases of mis-declaration at all even supposing that there was a -- mis-declaration on the part of the plaintiff and that T.D.1 notices dated 24-8-1943 were illegal and unauthorised, that neither s. 10 of the Tobacco (Excise Duty) Act 1943 nor -- Rule 8a of the abovesaid Rules applied and that the Plaintiff's application dated 1-6-1944 might be considered and decided without insisting on the prepayment of the differential duty. But the Additional Collector, in his communication No. T. Ex. 13-243 dated 28-6-1944 refused to consider the various legal points raised in his application dated 1-6-1944, unless the differential duty was paid. The Plaintiff's Advocate again addressed another letter dated 30-6-1944 to the Additional Collector, requesting him not to treat the Plaintiff's -- application dated 1-6-1944 as an appeal as no appeal was -- competent to the Collector under s. 35 of the Central Excise and Salt Act 1944 read with Rule 8la of the Central Excise Rules 1944 but to consider the points raised in paragraphs 1 & 2 of the abovesaid application dated 1-6-1944 and to pass such orders as he thought fit. It was also requested that a copy of the orders might be furnished to the Plaintiff by V.P.P.. But the Additional Collector did not give any reply to this -- letter of 30-6-1944 nor did he supply the certified copy of his orders. But in reply to the Plaintiff's petition dated 4-10-1944 sent through the Assistant Collector, Kolhapur Division, the Additional Collector refused to supply a copy of his orders on the untenable ground that it formed part of official -- correspondance. In the mean-time the Plaintiff received on 3rd October 1944 from the Circle Officer, Chikodi a notice dated 1-10-1944 to show cause why action should not be taken against the Plaintiff under Rule 7 of the Central Excise Rules 1944 and that if sufficient cause was not shown within 10 days of the receipt of the said notice or if the duty of Rs. 9550-14-0 was not paid into the Government Treasury within the said period of 10 days action would be taken against the Plaintiff under the

said Rule and the plaintiff would be liable to pay the -- penalty which may extend to Rs. 2000/- . Then the Plaintiff showed cause in his objections dated 9-10-1944 to the -- Circle Officer, Chikodi. The Assistant Collector Central Excise, Kolhapur Division to whom the show cause notice -- proceedings appear to have been sent for orders passed on 13-10-1944, without considering the various legal points raised in the said objections dated 9-10-1944, finding the plaintiff guilty of the offence under the said Rule and requiring the Plaintiff to pay a penalty of Rs. 25/-. Plff however deposited the said amount under protest on 29-11-1944 Being aggrieved approved by the said orders of penalty which is illegal and ultra vires the plaintiff submitted ~~that~~ an appeal on -- 19-12-1944 to the Collector of Salt Revenue Bombay under -- Rule 213 of the Central Excise Rules 1944, in which the -- plaintiff made a strong grievance that the Assistant Collecto Kolhapur Division wrongly found the plaintiff guilty ~~without~~ considering the various legal points raised in the plaintiff objections dated 9-10-1944 and without deciding whether and under what out of different catagories mentioned in Rule 79 of the Tobacco (Excise Duty) Rules 1943, the levy as the -- increased or differential duty could be included and -- supported though the Plaintiff challenged the application of the said Rule to the three consignments in question. But inspite of the plaintiff's prayer in the memo of appeal -- preferred against the levy of penalty of Rs. 25/-, that the appeal should not be transferred to the Additional Collector on the ground that he had already dealt with the matter -- on a previous occasion as detailed above and the Plaintiff had made comments upon his previous order, the Collector -- transferred the appeal to the Additional Collector ~~as~~ who has in his communication No. T. Ex. 13/243 dated 28-12-1944 intimated the Plaintiff's Advocate that the Collector cannot decide the appeal as an appeal against the orders of the -- Assistant Collector lies to the Central Board

Rule 213 read with S. 35 of the Central Excises and Salt Act 1944. The plaintiff does not believe that the Additional Collector could not unaware of the plain meanings of Rule 213, which provides in clear terms that an appeal against the orders of the Assistant Collector lies to the Collector and if between the date of the order or decision and the date of the hearing of the appeal the officer who passed the order is promoted to be the Collector the appeal shall lie to the Central Board of Revenue. As a matter of fact the Assistant Collector while sending to the plaintiff a copy of his order appealed against has intimated to plaintiff that an appeal lies to the Collector. Mr. A. S. Kyte M.B.E., Assistant Collector Kolhapur Division who passed the order against which the plaintiff preferred an appeal dated 19-12-1944 to the Collector was not promoted to be the Collector at all. plaintiff's grievance ore is that all the officers of the Central Excise -- Department from the lowest rank to that of the Collector in this presidency have purposely refused to consider the various legal points raised by the plaintiff in all his applications, letters of objections and appeal mentioned above and have been more anxious to levy the heavy duty of Rs. 9556-14-0 from the plaintiff for the obvious reason that an anxious and impartial consideration of the same might lead to an order favourable to the accused. They have failed to observe the principles of natural justice including full opportunity of being heard and an impartial consideration of the various points presented by those affected by the order and a liberal construction of fiscal enactment in favour of the subjects etc. para 3. They have also failed to take into consideration among others the following facts viz.,

(a) The three consignments in question were purchased by the plaintiff as a Commission Agent on a small commission for the Goa customer and not as a trader making huge profits.

(b). The differential duty demanded is very heavy and as the demand was made by the Central Excise Department long after the goods reached the customer to Goa via, Castle Rock, it was not and is not even now possible for the Plaintiff to recover the heavy duty from the customer at Goa where the law is different.

(c). The varity of tobacco in the three consignments in question was chewing. It was so accepted by the Sub-Inspector of Ankli at the time of his weighing the tobacco in the three consignments on 10-5-1943 and 12-5-1943. In the T. P. 1 permits issued by the said Sub-inspector in respect of the same after the payment of duty as demanded by him the Variety of the tobacco therein was also accepted by him as Chewing. Nay even in the T. D. 1. Notices dated 24-8-43 in respect of the same which are the foundations of the demand the Central Excise Officers have described the tobacco as chewing. Moreover the Central Excise Officers from the lowest rank to that of Collector of Salt Revenue have not disputed the fact that the variety of the tobacco in the three consignments was chewing nor have they instituted any enquiry in Goa territory to the knowledge of the Plaintiff by tracing the tobacco sent in the three consignments and establishing by reliable evidence that the variety was other than chewing.

In these among other circumstances, the Defendant is estopped from contending that the variety of the tobbacco was other

than chewing. Hence the demand of differential duty at 5 annas under T. D. 1 notices dated 24-8-1943 is illegal and -- ultra vires.

4. Rule 79 of the Tobacco (Excise Duty) Rules 1943 has no application to the three consignments in question as it was not even hinted by any of the Central Excise Officers from the Collec-tor to Range Officers that the duty levied at one anna per lb as per T. D. 1 notices dated 10-5-1943 and 12-5-1943 was short levied in respect of the same through inadvertance, error or misconstruction on the part of an off cer or through misstatement as to quantity on the part of the owner (to quote the words of that Rule). Hence the Sub-Inspector of Ankli has no jurisdiction or legal authority to again issue T. D. 1 notices dated 24-8-1943. Hence the Hence the demand thereunder is illegal & ultra vires.

5) Even supposing without admitting rules 79 valid, the said the three T.D.1 notices dt. 24-8-1943 are illegal and ultra vires. Rule 79 is qualified by Rule 85 of the said rules under which the Collector or a the Additional Collector alone and no other Central Excise Officer -- Subordinate to him could adjudge the increased duty amounting to more than Rs. 250/-. The fresh issue of the above said T. D. 1 notices by the Sub-Inspector of Ankli without such adjudgment was also illegal and unauthorised and null and void. Even supposing that there was such adjudgment, it was null and void as having been made without giving the Plaintiff an opportunity of being heard.

6. Plaintiff understands that the Central Excise Officers are attempting to recover the demanded duty of -- Rs. 9656-14-0 from the Plaintiff by coercive measures and has already illegally recovered penalty of Rs. 25/- purporting to be under Rule 7 of the Central Excise Rules 1944. As both the both demand of the said duty and recovery of penalty are illegal and ultra vires, the Plaintiff is obliged to file

Regular Civil Suit No.288 of 1945.

In the Court of the Civil Judge, Senior Division,
Belgaum.

1. Shankar Shiddappa Kore ... ... Plaintiff.

Vs.

1. The Central Government of India,
Delhi ... . Defendant.

Claim Rs.230/- for court-fee.
" 9586/24/- for Jurisdiction.

Herein, the written statement of the defendant is as under:-

1. The defendant denies the plaintiff's claim in toto.

2. The suit being against the Central Government, the authority to be named as the defendant must be "The Governor-General in Council" and not "The Central Government of India " as is described in the plaint. [Hence, the proper authority has not been impleaded and this being a material defect in the frame of the suit] [the suit as framed is not maintainable.

3. The suit is barred under Section 40 of the Central Excise and Salt Act, I of 1944 as the plaintiff seeks relief against the Assistant Collector's order dated the 13th October 1944, which was passed under rule 7 of the Central Excise Rules, 1944. The action of the Assistant Collector being bona-fide, the jurisdiction of the Civil Courts to entertain this suit is barred.

4. The defendant further contends that if for any reason, it be held that Section 40 of the afore-said Act does not apply, this is clearly a case of implied

exclusion of the right to file a suit. The Legislature has provided methods of redressing the injury caused by the acts of officers under the Act, by way of appeals to higher authorities and the Central Board of Revenue, whereby the ordinary jurisdiction of Civil Courts is ousted.

5. Without prejudice, The allegations in para 1 of the plaint that the plaintiff purchased the tobacco in question as Commission Agent of the Goa Merchant is not admitted. The plaintiff must prove the fact strictly. The -- averment that the Range Officer accepted the statement of the plaintiff that the tobacco to be cleared was a variety for chewing purposes and levied duty accordingly is not admitted. The rest of the allegations in the said paragraph are admitted.

6. The defendant submits that the statement of the plaintiff that the tobacco in question was a chewing variety was a misdeclaration and the Range Officer concerned also committed an error, either through mistake or inadvertance, in not immediately charging the said tobacco to the maximum duty leviable, as the said tobacco could be used for other purposes also viz. for "Bidees" and "snuff".

7. Regarding the allegations in para 2 of the plaint, the defendant denies that the Inspector of Central Excise, Chikodi Circle avoided ~~xxxxx~~ giving a reply to plaintiff's letter dated 31.8.1943 and that the Sub-Inspector, Ankli orally informed the plaintiff that the said three consignments were ~~xx~~ liable to duty at 6 As. per lb. because of their transport to Goa as per Circular issued to all Tobacco Officers by the Central Board of Revenue in July 1943. The allegations in the said para that all the Officers of the Central Excise Department from the lowest rank to that of the

Collector in Presidency have purposely refused to consider the various legal points raised by the plaintiff in his applications, letters and appeal and failed to observe the principles of natural justice etc. are baseless and unjustified. Otherwise, the mere statements of facts in para 2 are admitted.

8. Regarding the allegations in para 3 of the plaint, the defendant does not admit them. It is not true that in the T.D. 1 notices, dated 24.8.1943, regard--ing the three consignments in questions, the description of the tobacco is shown as 'Chewing'; but against the word 'variety' the words 'chewing exported to Goa' are written which clearly is not any variety of tobacco. It only shows under what classification it was exported to Goa and does not show that, that classification was accepted.

9. The defendant contends that there can be no estoppal and the idea of estoppel is misconceived.

10. The tobacco in question was charged to differential duty under rule 79 of the Tobacco Excise Duty Rules of 1943, as the tobacco exported to Goa could be made use of for purposes other than chewing, i.e. for preparing Bidis and snuff.

11. The allegations in para 4 are denied. There was no question of giving any hint by any of the superior officers to the Range Officer about the short-levy of any duty. The Range Officers themselves had the power under Rule 79 to demand duty short-levied, either owing to misdeclaration on the part of the plaintiff or an error or mistake on their own part to demand duty short--levied and the action of the Range Officer in the present case was intra-vires and legal in demanding differential duty which was short-levied.

12. The averment of plaintiff in para 5 of the plaint that the rule 79 is qualified by rule 85 of the said rules and that therefore the action of the Sub-Inspector or Range Officer, Ankli, was illegal and ultra-vires is wrong and misconceived. Rule 85 has no application to the present case.

13. The allegation that the duty is heavy etc. is irrelevant. The plaintiff was bound to pay it, the same having been demanded within 3 months, the period allowed by Rule 79.

14. For the reasons stated above, the plaintiff's suit should be dismissed with costs.

Belgaum, District Government Pleader,
Belgaum.

I, V. A. Mujumdar, District Government Pleader, Belgaum, do hereby on solemn affirmation state that what is stated above in paras 1 to 14, is true to my knowledge and information believed to be true.

Dated this day of 1946.

Belgaum.

In the Court of the Civil Judge, Senior Division,
Belgaum

Shankar Shiddappa Kore .. .. Plaintiff,

versus.

The Central Government of India,
Delhi. Defendant.

The following is the written statement on behalf of the defendant.

1. The suit being against the Central Government, the authority to be named as the defendant must be the Governor General in Council before the establishment of the Federation of ~~Justice~~ India. The suit as framed is therefore not maintainable.

2. The Assistant Collector's Order dated 13th October 1944, against which relief is sought was passed in good faith and under Rule 7 of the Central Excise Rules 1944 framed under section 37 of the Central Excises and Salt Act, 1944. It is therefore submitted that the jurisdiction of the Civil Court to entertain this suit is expressly barred under section 40 of the aforesaid Act.

3. If the Court is inclined to hold that section 40 does not apply, the defendant nevertheless submits that the jurisdiction of the Court is also impliedly barred. Accordingly to the provisions of the Central Excise and Salt Act, 1944, and Central Excise Rule 1944, which replaces the Tobacco (Excise Duty) Act X of 1943 and the Tobacco (Excise Duty) Rules, a person aggrieved by any order passed by a Central Excise Officer may appeal therefrom to the Central Board of Revenue or to any Central Excise Officer as directed by the Central Government; and during the pendency of the such appeal he must deposit the amount demanded from him under the Order appealed against in accordance with the provisions of section 189 of the Sea Customs Act, 1878, which have been made applicable under section 12

of the Central Excises and Salt Act, 1944 and Rule 215, to offences in respect of duties imposed on goods under section 3 of the Act: It is therefore, submitted that the Assistant Collector's Order related to the duty and penalty leviable in respect tobacco and hence the plaintiff's only right to challenge it is by way of an appeal after depositing with the Collector of Central Excise the amount demanded from him. The provisions referred to above oust the jurisdiction of the Civil Court to entertain a suit.

4. The defendant further submits that the tobacco in this suit could also be used for the purpose of biri or snuff and was therefore liable to higher rate of duty at 6 annas per pound. Moreover, it having been exported to Goa, and there being in that case no possibility of checking its subsequent use, it was liable to be assessed at the maximum rate provided by law. In this case the duty of one anna per pound was short levied through inadvertence and error on the part of the Range Officer and therefore the plaintiff is liable to pay the differential duty under Rule 79 of the Rules of 1943.

5. The plaintiff's contention that Rule 79 is subject to Rule 85 is misconceived and untenable and therefore not admitted. Rule 85 applies to cases in which anything is liable, inter alia, to increased rate of duty: Rule 79 on the other hand applies to cases in which an article liable to be assessed a particular rate has through inadvertence, error rate, etc. been assessed at a lower rate. Rule 85 is irrelevant.

6. The contention as regards estoppel is also misconceived and untenable. If the duty was short levied, the mere fact that the tobacco was stated to be of chewing variety will not debar Government from enforcing its statutory right under Rule 79 (now Rule 10 of the Central Excise Rules). This is on the principle that there can be no estoppel against statute. Moreover, in this case the sub-Inspector Central Excise had

exceeded his authority in assessing the tobacco at a lower rate and his act not having been ratified expressly or impliedly by Government, the principle of estoppel does not apply.

7. The contention that the duty demanded is very heavy is irrelevant. The demand having been made within the prescribed period is legal. Plaintiff's alleged inability to recover the amount from his customer in Goa cannot affect the correctness of the demand.

8. Plaintiff's allegations in paragraph 2 of the plaint against the officers of the Central Excise Department are scandalous, irrelevant and untrue and are denied.

9. It, therefore, submitted that the suit fail and must be dismissed with costs.

District Government Pleader,
Belgaum.

I District Government Pleader, Belgaum, do hereby declare that what is stated in paragraphs 1 to 9 above is true according to the information received and believed to be true. This verification is made at on the day of 1946.

District Government Pleader,
Belgaum.

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Suit No. 288 of 1945.

In the Court of the Civil Judge,(S.D.) Belgaum.

1. Shankar Siddappa Kore ... ... Plaintiff.

Vs.

1. Central Govt. of India ... ... Defendant.

Issues.

1.(a) Is the description of the defendant in the cause-title of the plaint defective?

(b) If so, is the defect fatal to the suit ?

2. Is the suit barred under Section 40 of the Central Excise and Salt Act of 1944 ?

3. Is the jurisdiction of the Civil Court ousted as contended by the defendant ?

4.(a) Was the tobacco in question dutiable at the rate of 6 annas per pound ?

(b) If so, is the plaintiff who has paid at the rate of one anna only, not liable to pay the differen--ce of 5 annas per pound ? Does plaintiff prove that the defendant is estopped from claiming this difference ?

5. Is plaintiff entitled to the declaration and injunction sought ?

6. What decree ?

No more sought.

Sd. B.C.Patil.

5.4.1946. C.J.,(S.D.)

Brief sent to the
Press for printing
Dec.
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This is a suit for a declaration that the duty of Rs. 9556-14-0 sought to be recovered from the Plaintiff is "illegal,ultra vires and null and void"and for a permanent injunction restraining the Defendent from recovering the same by coercive measures through the Collector of Belgaum. A sum of Rs.25/-has been recovered from the Plaintiff by way of penalty and the Plaintiff prays for its refund on the ground that the imposition of the penalty is "illegal,ultra vires and null and void".The allegation in the plaint may be summarised as follows:- The Plaintiff is a commission agent of various customers in British India,Native States and Goa,dealing in tobacco.In about April or May 1943 he received orders from merchants in Goa for sending "chewing" tobacco to Goa via Castle Rock.He applied to the Assistant Collector,Central Excise,Kolhapur Division,for the necessary transport permits under Rule 14 of the Tobacco (Excise Duty) Rules 1943 in respect of the consignments of chewing tobacco,which the Plaintiff purchased as commission agent for the said Goa merchants.There-upon the Sub Inspector of Ankli,Central Excise,(whose designation has been since changed to Range Officer,Ankli Range,Central Excises) got the three tobacco consignments of 9861 Lbs.,10790 Lbs.and 9931 Lbs.weighed in his presence on the dates 10-5-1943, 12-5-1943 and 12-5-1943 respectively and served on the Plaintiff on those respective dates T.D.1 notices bearing Serial Nos.18744,18745 and 18746 for payment of the duty payable unddr the Tobacco (Excise Duty)Act 1943. After an examination of the variety in each of the said consignments at the time of weighing, the said officer accepted them as a variety for chewing purplses. The amount of duty denoted in the said notices was Rs. 816-5-0, Rs. 674-6-0 and 620-11- respectively and the description of the variety was given as chewing tobacco. The Plaintiffpaid the said amount into the Chikodi Sub-Treasury respectively on 20-5-1943,,22-5-43 and 22-5-1943. Thereupon on Plaintiff's application the Sub-

Sub-Inspector gave him the necessary transport permits authorising the Plaintiff to transport the three consignments to Goa via Castle Rock. The three consignments were accordingly transported to Goa via Castle Rock about the end of May 1943 Thereafter on 24-8-1943 the same officer purported to issue three notices in Form T.D.1 in respect of the very three consignments demanding payment of "differential duty at the rate of 5 As. per Lb. amounting respectively to Rs. 3081-9-0 Rs. 3171-14-0 and Rs. 3103-7-0 mentioning in the Assessment particulars against the item "variety" as Chewing"exported to Goa". Plaintiff by his letter, dated 31-8-1943, made a reference to the Inspector, Chikodi Circle, who avoided giving a proper reply in writing. The Sub Inspector orally informed the Plaintiff that the said three consignments were liable to duty at 6 annas per Lb. because they were transported to Goa, according to a Circular issued to all Tobacco Officers by the Central Board of Revenue in July 1943. The said Circular is illegal and ultra vires and at any rate could not be given retrospective effect as the three consignments had been transported to Goa long before the said Circular. On 22-3-1944 the Circle Circle Officer, Chikodi, issued a notice calling upon the Plaintiff to pay the so-called differential duty. Thereupon on 2nd April 1944 the Plaintiff made an application to the Collector of Salt Revenue, Bombay, through the Range Officer, Ankli, requesting him not to levy the duty. That application was not forwarded to the Collector at all. On 1-5-1944 Plaintiff made an application to the Collector of Salt Revenue directly setting out the grounds showing the illegality of the demand. That application was sent to the Additional Collector for disposal, who intimated that the original levy at the rate of 1 Anna was short levied by the Range Officer, Ankli, through mis-declaration on the part of the plaintiff, that Rule 79 of the Tobacco (excise Duty) Rules applied, that the failure to pay the differential duty as demanded was an offence punishable under Rule 82 of the

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said Rules read with section 10 of the Act of 1943 and that the Plaintiff's application would not be considered unless the duty was deposited in accordance with Section 189 of the Sea customs Act of 1878. The Plaintiff's advocate's submkssions to the contrary and his request that the Pre-payment of the differential duty could not and should no-t be insisted upon were over-ruled by the Additional Collector who by his communication, dated 22-6-1944, refused to consid -er the various legal points, unless the differentil duty was first paid. The plaintiff's further attempts to get his submissions considered by the Higher Officers failed. On 3rd October 1944 the Plaintiff received a notice from the Circule Officer, Chikodi, to show cause within 10 days why action should not be taken against him under Rule 7 of the Central Excise Rules 1944 or in the alternative to pay the duty of Rs. 9556-14-0 into the Government Treasury within 10 days, on failure of which, it was intimated, that the Plaintiff would be liavle to pay a penalty which may extend to Rs 2000/- . The Plaintiff showed cause to the Circle officer, Chikodi, on 9-10-1944. The proceedings were sent to the Assistant Collecoor and that Officer , without considering the various legal points, raised in the objectio -ns filed on 9-10-1944, passed an order on 13-10-1944 finding the plaintiff guilty of the offence under Rule 7 and required the plaintiff to pay a penalty of Rs. 25/- . Thereupon on 29-11-1944 the Plaintiff deposited the amount of the penalty under protest . The Plaintiff submitted an appeal to the Collec or of Salt evenue, Bombay, against the order imposing the penalty. The Collector trasferred the appeal to the Additional Collector and the latter informed the Plaintiff's advocate that an appeal lay to the Central Board of Revenue and not to the Collector. The Plaintiff submits that that view is wrong. As a matter of fact in the copy of the order appealed against the Assistant Collector has intimated to the Plaintiff that an appeal lies to the

the Collector. The plaintiff understands that the Central Excise Officers are attempting to recover the additional duty of Rs. 9556-14-0 by coercive measures. Hence this suit has been filed. The cause of action for this suit arose in December 1944 when the Plaintiff learnt that the Collector, Belgaum, had been moved to recover the said duty from the Plaintiff by coercive measures and on 29-11-1944 when the plaintiff deposited Rs. 25/- into the Sub-Treasury and o-n 28-12-1944 when the Collector of Salt Revenue resused to refund the said amount to the Plaintiff. A notice under section 80 of the Code of Civil Procedure has been served on the Defendant on 30-1-1945.

2. The written statement filed on behalf of the Defendant (exh.21) raises the following contentions :- The suit being against the Central Covernment, the authority to be named as the Defendant must be the Governor General in Council The suit as framed is, therefore, not maintainable. The Assistant Collector's order, dated 13-10-1944, was passed in good faith and under Rule 7 of the Central Excise Rules 1944 framed under seccion 37 of the Central Excises and salt Act, 1944. It is therefore submitted that the jurisdiction of the Civil Court to entertain this suit is expressly barred under section 40 of the aforesaid Act. The Defend nt also submits that the jurisdiction of the Court is impliedly barred. According to the provisions of the Central Excise and Salt act 1944, and Central Excise Rules 1944, which replace the Tobacco (Excise Duty) Act X of 1943 and the Tobacco (excise Duty) Rules, a person aggrived by any order passed by a Central Excise Officer may appeal therefrom to the Central Board of Revenue or to any Central Excise Officer as directed by the Central Government; an-d during the pendency of such an appeal he must deposit the amount demanded from him under the order appealed against in accordance with the provisions of section 189 of the sea Customs Act, 1878,which have been made applicable under

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under section 12 of the Central Excises and salt Act, 1944, and Rule 215 to offences in respect of duty imposed under section 3 of the Act. It is, therefore, submitted that the Assistant Collector's order related to the duty and penalty leviable in respect of tobacco and hence the Plaintiff's only right to challenge it is by way of an appeal after depositing the amount demanded. these provisions oust the jurisdiction of the Civil Court to entertain this suit. The Defendant further submits that the tobacco in question could also be used for the purpose of making Bidies or snuff and was therefore liable to the higher rate of duty at 6 Annas per Lb. Moreover as it was exported to Goa and there was no possibility of checking its subsequent use, it was liable to be assessed at a maximum rate provided by law. In this case the duty of one anna per pund was short levied through inadvertance and error on the part of the Range officer and therefore the Plaintiff is liable to pay the differential duty under Rule 79 of the Rules of 1943 Rule 86 to which plaintiff refers in his plaint has no application to the present case as what is demanded is not an increased rate of duty. There is no estoppel. If the duty was short levied, the mere fact that the tobacco was stated to be of chewing variety will not debar Government from enforcing its statutory rights under Rule 99 (now Rule 10 of the Central Excise Rules). There can be no estoppel against statute. Moreover the Sub-Inspector exceeded his authority in assessing the tobacco at a lower rate and his act has not been ratified expressly or impliedly by Government. The plaintiff's alleged inability to recover the amount of the demand from his customers in Goa cannot affect the correctness of the demand. The demand has been made within the prescribed period and is legal.

3. The issues settled for determination by Mr. B.c.Patil, Civil Judge, Senior Division, vide xh. 25, are as follows:-

1 a. Is the description of the Defendant in the cause

-title of the plaint defective ?

b. If so,is the defect fatal to the suit ?

2. Is the suit barred under section 40 of the Central excise and Salt Act of 1944 ?

3. Is the jurisdiction of the Civil Court ousted as contended by the Defendant ?

4 a. Was the tobacco in question dutiable at the rate of 6 annas per pound ?

b. If so,is the Plaintiff who has paid at the rate of one anna only,not liable to pay the difference of 5 annas per pound ? Does Plaintiff prove that the Defendant is estopped from claiming this difference ?

5. Is Plaintiff entitled to the declaration and injunction sought ?

6. What decree ?

4. My findings are :-

1 (a) Yes

(b) No; it can be rectified.

2. No.

3. No.

4 (a) No.

(b) The issue does not survive.

5. Yes.

6. As in the final para.

Reasons

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Reasons.

5. Issue No.1:- At the time of the arguments the Plaintiff's pleader made the application,Exh 77,for correcting the misdescription of the Defendant in the title of the plaint by adding the words "i.e.the Governor General in Council".That application is calculated to make the description of the Defendant comply with the provisions of Section 79 Civil Procedure Code.The Government pleader for the Defendant has by Exh 78 objected on the ground of delay inspite of the specific ground in para 2 of the written statement,but has at the same time left to the discretion of this Court whether to allow the application or not. The Act No.X of 1943 refers to "the Central Government"and that is why the Defendant was originally described by that name.That is merely a misdescription in naming the authority to be sued under Section 79 of the Civil Procedure Code.That misdescription has caused absolutely no prejudice to the Defendant nof misled him on any point.Such a misdescription can,therefore,be corrected.See Subedar Samundar V. Secretary of State,A.I.R.1939 Lahore 298;Saraspur Mfg.Coy V.B.B.&C.I.Railway,I.L.R. 47 Bombay 785.I,therefore,allow the Plaintiff to amend the description of the Defendat - in the title of the plaint. My findin is that the original description is defective, but the defect is not fatal to the suit and can be corrected.

6. Issue No.4 :- The tobacacco in question was re-exported to Goa in May 1943 under the trnsport permits, Ext.65, dated 26-5-1943, and Exh.66, dated 28-5-1943, which the Excise Sub-Inspector Naik (69) issued after the - Plaintiff had paid the duty as demanded from him under the demand notices, Exh.43, dated 10-5-1943, Exh.44,dated - 12-5-43 and Ex.45 dated 12-5-43. The demand for "differential" duty was made by the notices, Exhs.46,47 and 48, issued by the same Officer on 24-8-43. At these material

dates

dates the law in force was Act No. X of 1943 and the Tobacco (Excise Duty) Rules 1943, framed under Section 14 of that Act. The power of levying and collecting the duty is given by Section 3 of that Act, and that Section says that thd duties shall be at the rates set forth in the Schedule. It is common ground that the tobacco in this case was " country tobacco " coming under II of Part I of the Schedule. Clauses (1) (b)(e) and Clause (3) prescribe a rate of 6 annas per Lb. if the country tobacco is " intended for manufacture into" "Biris" "snuff" or " for any other purpose"; and Clause (2) prescribes a rate of 1 anna per Lb. if the country tobacco is " intended for sale as chewing tobacco, whether manufactured or merely cured ". In Exhs. 43 to 48 and 65 and 66 the variety of the tobacco is given as " chewing". Therefore according to the Schedule the duty leviable is one anna per pound and not 6 annas per Lb. on such tobacco. All the same in Exhs. 46 to 48 additional 5 annas per pound have been demanded. It is for the Defendant to show how that duty is leviable, since duty at the rate of ane anna was levied according to Exhs 43 to 45 on the same tobacco and it was permitted to be removed and sent to Goa under the permits, Exhs 65 and 66.

7/- In paragraph 4 of the written statement, Exh. 21, two grounds are given for levying duty at 6 annas per pound, viz. (1) the tobacco " could also be used for the purposes of Biris or snuff "; and (2) " It having been exported to Goa, and there being in that case no possibility of checking its subsequent use, it was liable to be assessed at the maximum rate provided by law". As regards this second ground nothing has been pointed out from the Act or the Rules thereunder how country tobacco intended for sale as chewing tobacco was liable to be assessed at the maximum rate of six annas merely because it was exported to Goa. It appears from what the Plaintiff has alleged in his appeal to the Collector, Exh. 52 that the Plaintiff was informed by the Range Officer (the

present -

present equivalent of Sub Inspector) that in July 1943 there was a Circular issued by the Higher Authority that tobacco transported to Goa should be charged the maximum rate of six annas. That allegation was not contradicted at any time. The fact that in Exhs 46 to 48 the Sub Inspector has described the tobacco as " chewing exported to Goa" indicates that because it was exported to Goa, he thought he should charge duty at the rate of six annas, as, evidently by describing it as "chewing" tobacco, he could not charge duty at the higher rate of six annas. His explanation that he put that description merely for indentifying which tobacco was referred to is not at all intelligible because that was the place where he had to mention the correct classification of the tobacco, as according to him, by Exhs 46 to 48 he was correcting the mistake which he had committed in Exhs 43 to 45 by charging a rate of 1 anna per pound. However, at the end of his dexposition Sub Inspector Naik has definitely stated that there was no circular issued by the Central Board of Reveue that all country tobacco exprorted to Goa should be charged at the maximum rate of six annas. It is obvious that any such circular would be ultra vires of the Central Board of Revenue. The rate of duty is fixed by the Schedule in the Act and under Secr on 3 that is the prescribed rate payable. Under clause (xiii) of Section 14(2) of Act X of 1943 the Central Government can authorise by a Rule the Central Board of Revenue and all Collectors to provide by written instructions for supplementary matters arising out of any rule made by the Central Government and accordingly by Rule 94 of the 1943 Rules such power has been given to the Central Board of Revenue and Collectors. But directing that all country tobaccome xported to Goa should be charged at the maximum rate of six annas is not such a " supplementary matter". It would be a direct infringement of Section 3 of the Act and the Schedule and so would be obviously ultra vires of the Central Board of Revenue or the Collectors. It is, therefore, difficult to understand the defence in para 4 of the written

statement -

statement, Exh 21, that because the tobacco was exported to Goa and it was not possible to check its subsequent use there, it was liable to be assessed at the maximum rate provided by law. That defence in my judgement x is untenable. If the subsequent use of the tobacco cannot be checked by the Defendant, it cannot also be chekked by the Plaintiff and having once recovered duty from him and allowed the Plaintiff to divest himself of the tobacco and the power of controlling its subsequent use, it is difficult to understand the justice of recoverning from him additional duty on the supposition that the persons to whom the tobacco has been sent to Goa may put it to some other use than as " chewing tobacco". Certainly the Act and the Rules do not support such a view, and nothinghas been shown to me which can justify such a contention in law. I, therefore, confine myself to the first ground, viz. that the tobacco in question " could also be used for the purpose of Biris or snuff".

8/- The words " intended for" used in the Schedule are capable of two interpretations. The intention may be of the person who applies under Rule 14 of the 1943 Rules for a permit to clear the tobacco and in that case his declaration or representation determines the class in which it falls. The words may also mean that the intrinsic quality of the tobacco itself at the time of the application for permit is a factor to be considered when determining whether the tobacco is "intended for" one or the other purposes and in that case the Officer levying the duty will not be bound by the applicant's declaration or representation and can bring his own judgement to bear on the question. The answers which the Sub Inspector Naik (Exh 69) has given to the questions put by me on this point have left me in doubt as to what he himself thinks or thought to be the correct interpretation at the time he levied the duty initially at one anna per pound and later on proceeded to demand duty at the xh higher rate of six annas per pound. The written statement (Exh 21) is also not clear

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on this point. Some of the correspondence that passed between the Plaintiff's Advocate and the Excise Authorities subsequent to the demand of duty at six annas per pound has been produced in this suit and therein I do not find anything to enlighten me on the point. Even in Exh 57, where this issue ought to have been considered in a judicial manner, absolutely nothing is said as to why tobacco which the Sub Inspector had himself seen and weighed and described as "chewing" and charged at one anna per pound was liable to duty at the rate of 6 annas per Lb. It has been held that fiscal statutes must be constructed strictly, and that a construction most favourable to the subject must be adopted. See Emperor V. KandarBhoy, 29 Bombay Law Reporter 987, per Fawcett J. on page 990 and per Patkar J. on page 995. The proper words to import the second of the two constructions stated above would be "fit for" or "capable of" and not the words " intended for". In their natural meaning the words must have reference to the intention of the person who wants to clear the tobacco from the ware house. However, I will consider this x issue keeping in mind both the constructions.

9. There is a form of application prescribed for an application for clearance of tobacco from a bonded ware house (Form No.18 under Rule 2(xi) of the 1943 Rules) and that is obviously the place where the applicant has to declare for what purpose the tobacco is intended. In Exh.51, the Additional Collector of Central Excise has said that the Sub-Inspector assessed at a lower rate through "misdeclaration" onn the part of the Plaintiff. That clearly indicates that the Plaintiff made a declaration in writing that the tobacco was intended for sale as chewing tobacco. It is, therefore, rather surprising to find the Sub-Inspector Naik (Exh.69) deposing that the - Plaintiff represented that the tobacco "was to be used for Biris, snuff, chewing and other purposes ". In order to make myself sure as to what he mant, I put him questions and he wound up

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his answers by saying categorically "In the present case I say that thePlaintiff told me that the tobacco was intended to be used for manufacture into Biris,snuff and chewing also." As the witness had omitted to say anything as to whether and what declaration the Plaintiff had made in writing, I asked the - Government Pleader who in my presence consulted an Officer of the D epartment who was instructing him, and stated that there must be such a declaration in writing. That was not produced though I inquired about it. I, therefore, conclude that in the written declaration the Plaintiff stated that the tobacco was intended for sale as chewing tobacco. If, as the Additional Collector says, it was a mis-declaration, that was deliberate in order to avoid paying higher duty and so it is impossible to believe Sub Inspector Naik's version that Plaintiff - represented to him that the tobacco was intended to be used also formaking Biris and snuff and for other purposes. The Sub Inspector has followed up this statement by saying that he charged at the lesser rate of one anna through mistake and inadvertance as he was very busy. That statement also cannot be believed because he has used the description "chewing - tobacco" in Exhs 43 to 45, repeated it in Exhs 65 and 66 and again repeated the same in Exhs 46, 47 and 48, which latter fact is surprising, since, according to him, in Exhs 46 to 48 he was correcting his mistake in respect of classification of the tobacco. The only explanation of this, otherwise inexplicable, conduct of the Sub Inspector would be that after he had levied the duty and issued the transport permits, he realised, whether by reason of a circular alleged to have been issued by the Central Board of Revenue in July, 1943 or by reason of any advise or direction of any superior Officer on the ground of impossibility of detection of subsequent user (a ground which finds place in para 4 of the written statement), that as the tobacco was being exported to Goa the maximum duty should be levied on it even though it was " intended for sale as chewing tobacco " and that is why he wrote

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in Exhs 46 to 48 against " variety""Chewing exported to Goa" which is intelligible in the context in the only sense that the higher duty was charged not because it was " chewing tobacco" but because it was "exported to Goa". I, therefore, do not believe the Sub Inspector Naik's statement that the Plaintiff himself represented to him that the tobacco was intended for making Biris and snuff and for other purposes also.

10/- Assuming that it ~~xi~~ is for the Sub Inspector to judge in what class the tobacco comes, the Sub Inspector in the present case saw the tobacco himself before issuring the first demand notices, Exhs. 43 to 45 and the transport permits, Exhs 65 and 66, and allowed the tobacco to be cleared and exported to Goa, and therefore must be presumed to have decided on his own judgement that it was "chewing tobacco" i.e. tobacco intended for sale as chewing tobacco as declared by the Plaintiff. It, is therefore, for him to give satisfactory reasons for revising his previous decision. He admits that the tobacco was in "Pendhis" (sheaves tied in bundles) i.e. of the type A before the Court, which is usually and popularly used for chewing, as distinguished from "Jarda" (cleaned and broken tobacco) of the type B before the Court, which is used for making Biris and snuff. But the Sub Inspector says that the tobacco could be made suitable for manufacturing Biris and snuff without stating his reasons for saying so. For establishing the point that "Pendhi" Tobbacco" of type A can be used for making Biris and snuff and " for all purposes" the defence have examined one witness Laxman Khot (Exh.70). This witness says he was present at the time Sub Inspector Naik weighed the tobacco, and saw the tobacco, and that it was Pendhi" tobacco of the type A and that "Pendhi" tobacco " is used only for chewing". But he goes on to add that it is also used"for all purposes" . At the same time he says that tobacco of the type B, which is cleaned of all stumps and fibres and is broken, is the kind used for Biris and chewing and " for all purposes" and that he would value type A

higher than type B. Thus in his anxiety to help the defence, he has said virtually that all country tobacco can be used for all purposes, whether it be of type A or type B. If that were the truth and if the liability to the higher rate of six annas was to depend on the possibility of even "Pendhi" tobacco being used for making Biris and snuff and "for all purposes", then there is no meaning at all in differentiating between tobacco "intended for manufacture into Biris and snuff" and "for other purposes" and tobacco "intended for sale as chewing tobacco" and prescribing higher rate for the former and lower for the latter. This witness (Exh.70) admits that he obtained a permit from this very Sub Inspector for selling his tobacco of the "Pendhi" (type A) kind and conveniently forgets at what rate duty was levied thereon. This merely indicates that he must have been charged at one anna and is not prepared to admit the fact. It is undeniable that type A is uncleaned whereas type B is cleaned, and therefore the witness, Exh 70 is not stating the truth when he says that the value of type A is more than the value of type B. It is, therefore, impossible to rely on the opinion of such a witness. On the Plaintiff's side witness Babu (Exh 74) has explained the processes of preparing "Pendhi" tobacco (type A) and "Jarda" (type B) and why "Pendhi" tobacco cannot be used for making Biris and snuff. That is also stated by Plaintiff's witness Dattaram, Exh. 72. At best it may be said in favour of the Sub-Inspector's version that it is possible to make "Jarda" into (type B) out of "Pendhi" (type A) by drying it, removing all stumps and fibres, and cleaning it. But the rate of duty is to be determined by the condtion in which the tobacco is at the time of the clearance and the amount of duty is assessed according to the weight. Obviously a pound of "Pendhi" cannot be converted into a pound of "Jarda". It is bound to be much less in weight. Therefore even if Sub Inspector

Naik's

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Naik's opinion is accepted, as he has to levey duty according to weight, he has to classify the tobacco in the condition in which he finds it. In this case admittedly it was in "Pendhis i.e. sheaves, in which condition it can on y be used for chewing and not for making Biris or snuff. Therefore even accord -ing to his own opinion, the charging of additional five annas on the entire weight of the "Pendhi" tobacco, as he has done in 46 to 48 is wrong.

11/- In my judgement the defence have failed to estalish that the tobacco in question was liable to duty at the rate of six annas per pound. Part(b) of issue No. 4, therefore, does not survive for consideration.

12/- Issue No. 2- Sub section 1 of Section 40 of Act No. I of 1944 creates an absolute bar to any suit against the Central Government in respect of any order passed in good faith or any act in good faith done or ordered to be done under that Act. Having regard to Section 6 of the General Clauses Act (X of 1897) the liability incurred by the Plaintiff to pay duty under the Act of 1943 and the right of the Defendant to recover the same are not affected by reason of the repeal of that act by Act No. I of 1944, Correspondingly under the same Section, the Plaintiff's remedy in respect of any such right of the Defendant and in respect of any liability under the repealed Act is also not affected by the repeal of that Act. Act I of 1944 came into force on 28-2-1944. The demand made by Exhs 46 to 48 is in respect of tobacco cleared in May 1943 and is under Section 3 and the Schedule of the Act No. X of 1943 and Rule 79 of the Tobacco (Excise Duty) Rules, 1943, framed under that Act. In Act X of 1943 there was no such Section corresponding to Section 40 of Act I of 1944. There was nothing in Act X of 1943 to deprive the Plaintiff of his right of action in a Civil Court in respect of any act done or order passed under that Act and the rules thereunder. Section 40 (1) of Act I of 1944 does not deal with prodedure; it taken

away the right of action. Therefore it cannot be applied to a right of action in respect of an order passed or act done under the Act X of 1943. In the Hope Mills, Ltd., V. Vithaldas, 12 Bombay Law Reporter 730, it has been held " where a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after passing of the Act". Therefore in my judgement Sub Section 1 of Section 40 of Act I of 1944 is not a bar to the present suit.

13/- The Government pleader has replied on Sub-Section(2) of Section 40 of Act I of 1944 and argued that the present suit is barred by limitation. In the written statement, Exh. 21, there is no pleading that the suit is barred by limitation. The last sentence in paragraph 2 of the written statement obviously refers to the bar under Sub-Section (1) of Section 40. But in view of Section 29 of the Indian Limitation Act read with section 3 of that Act, it is open to the Government Pleader to argue that, on the record as it stands, the suit is barred by limitation, though no plea to that effect has been expressly taken in the written statement as required by Rule 2 of Order 8 Civil Procedure Code. There are observations in the decision of the Bombay High Court cited above which are calculated to support the argument that Sub-Section 2 of Section 40 of Act I of 1944 will determine the period of limitation for such a suit. The Act or order which has forced the Plaintiff to seek his remedy in this Court is the order passed by the Assistant Collector on 10th December, 1944 under Section 11 of Act I of 1944 for the recovery of the additional duty. Exh. 62 is that order. The Plaintiff has to give notice under section 80 of the Civil Procedure Code and to wait for two months. It is admitted that in this case the Plaintiff did give such a notice

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on 30-1-1945 and Exh 50 is the postal acknowledgement of receipt of that notice. The two months' period has to be excluded having regard to Section 15(2) of the Indian Limitation Act which by virtue of Section 29 of that Act is applicable. This suit has been filed on 28-7-1945. I, therefore, hold that even if Sub-Section (2) of Act I of 1944 governs this suit, this suit is not barred by limitation.

14/- In both of the Sub-sections of the Section 40 the words used are " Act ordered to be done under this Act". Under Section 11, under which the Collector of Belgaum has been ordered to recover the amount, vide Exh. 62, the amount that can be ordered to be recovered is the amount " payable to the Central Government under any of the provisions of this Act or of the Rules made thereunder." Therefore it must appear Prima facie in the demand notice that the amount of duty demanded is under any of the provisions of the Act or the Rules. Exhs. 46 to 48 on their face do not show under what provisions of the Act X of 1943 or the Rules of 1943, the demand is made. The language used does not indicate rhat the demand is made under Rule 79 as it says " on production of the Treasury receipt, you may apply to me for a permit to remove the goods for sale or manufacture " which obviously is the form used for a demand made under Rule 14 before the clearance of the goods. Further on it is stated in the demand notice that the variety of the tobacco is "chewing exported to Goa". According to the Schedule, the rate for chewing tobacco is one anna per pound, and the Sub Inspector has now admitted that at no time was chewing tobacco exported to Goa assessable at the rate of six annas per pound. Therefore the further statement in the demand notices " differential rate of duty at five annas per pound " is prima facie unsupportable under any of the provisions of the Act, Schedule and the Rules in view of the description of the variety given by the Sub Inspector in the demand notices. For all these reasons, the

demand -

under Exhs 46, 47 and 48, which the Plaintiff was called upon to comply with, did not on its very face come under any of the provisions of Act X of 1943 or the Rules thereunder. Therefore also the penalty of Rs. 25/- imposed by the Assistant Collector by his order, Exh. 57, for non-compliance with these demand notices is not an act done under the Act or the Rules. He has purported to act under Rule 7 of the Rules of 1944. The word "duty" is defined in Rule 2 of those Rules as " The duty payable under section 3 of the Act". I have shown that the demand on its vary face was in contravention of section 3 of the Act.

15/- The Government pleader has relied on the words " In good faith". Those words occur only in Sub-Section 1 which I have held is not applicable at all to the present suit, and do not occur in Sub-Section (2) of Section 40 of the Act I of 1944. He has relied on the definition of " good faith " in Section 3 (20) of the General Clauses Act. Even under that definition it is for the Officers of the Defendant to show that whatever was done was done honestly. That word does not necessarily mean that corruption on the part of the Officer must be proved or alleged. At the minimum what the Officer has done must show that he believed that he was doing the right thing under any of the provisions of Act and the Rules. The only Officer examined is Sub Inspector Naik and the act that he has done is the issuing of the demand notices, Exhs 46 to 48, and he has been unable to explain in his deposition how he believed that the tobacco which he himself described as of the chewing variety was assessible at the rate of six annas per pound. The order Exh 57, proceeds on the basis that the demand was right but gives no reasons in support of the hypothesis. That had to decide under Rule 7 of the Rules of 1944. The order imposing penalty was made without considering the question whether the demand was really for " duty payable under Section 3 of the Act". It merely says this tobacco was correctly assessible to duty at the time at six annas per pound. Therefore the imposition of penalty under Rule 7 was on a wrong

assumption of jurisdiction. I would, therefore, if necessary hold that the words " in good faith" appearing in Sub-section(1) of Section 40 cannot help the Defendant.

16/- My finding on issue No. 2 is, therefore, in the negative.

17/- Issue No. 3 :- This issue is intended to cover the contentions in paragraph 3 of the written statement, Exh. 21. I have already held that the Plaintiff's right of action, which accrued to him under the Act X of 1943, cannot be affected by any of the provisions of Act I of 1944 and the Rules of 1944. Even assuming that Rule 213 is applicable, there is nothing in the Act of 1944 and in the Rules (provided Section 40 is not a bar) that the Plaintiff must exhaust all the appeals before he can sue in a Civil Court or that his remedy is only by way of appeal to the Collector and the Central Board of Revenue and that he cannot proceed by way of a suit. In fact Rule 213 has to be read in the light of Secton 40 of the Act and the bar of a suit is only under Section 40 and not otherwise as appears to have been contedned in para 3 of the written statement. It is, therefore, unnecessary to consider the further argument that provisions of Section 189 of the Sea Customs Act, 1857 should have been complied with by the Plaintiff. That section is made applicable under Section 12 of Act I of 1944 and Rule 215 and in the present case the demand made by Sub Inspector Naik, vide Exhs. 46 to 48, was on its very face not referrable to the provisions of Section 3 of the Act X of 1943 and the Schedule thereunder nor to Rules 14 and 79 of the 1943 Rules. My finding is, therefore, in the negative.

18/- Issue No. 5 :- It, therefore, follows that the Plaintiff is entitled to the reliefs prayed for by him.

O r d e r.

19/- Declared that the levy of additional duty of Rs. 9556-14-0 as per demand notices, Exhs. 46 to 48 and the threatened recovery thereof, vide Exh. 62, and the imposition

and -

imposition and recovery of the penalty of Rs. 25/-, vide Exh. 57 and Exhs 62 and 49 are illegal and Ordered that the Defendant be, and is hreby, restrained from recovering the said amount from the Plaintiff and do refund to the Plaintiff the amount of Rs. 25/- and do pay the costs of the Plaintiff and do bear his own costs.

Sd/- D.R.Ugrankar.
Civil Judge, Senior Division
23rd December, 1946.

(continued from preceding page)

The first ground of defence was that the jurisdiction of the Court to entertain the suit was expressly barred by section 40(1) of the Central Excises and Salt Act I of 1944. On this issue the trial Court held, relying on section 6 of the General Clauses Act X of 1897 that the plaintiffs liability to pay differential duty on the tobacco consignment in question, and Government's right to recover the same accrued under the Tobacco (Excise Duty) Act of 1943 and were not affected by the repeal of the Act of 1943 and that, correspondingly, plaintiff's remedy in respect of any such right and liability was also not affected by the repeal of that Act. It was further held that the Act of 1943 did not contain any section corresponding to section 40(1) of the Central Excises and Salt Act, 1944 and consequently the latter section could not be applied to a right of action which accrue in respect of anything done under the Act, 1943 (Judgment para. 12). In arriving at this conclusion the learned Judge has assumed that the cause of action for the suit arose when the Sub-Inspector, Central Excise, issued the three demand notices for the differential duty on tobacco in August 1943 (Vide C.S.F. para. 3). That however, is not correct. It is clear from para. 7 of the plaint that this suit is for relief, first, against the Assistant Collector's order dated 13th October 1944 imposing upon him a penalty of Rs. 25 under Rule 7 of the Central Excise Rules 1944 and ordering him to pay Rs. 9556-14-0 on differential duty within 15 days from the date of despatch of that order and secondly against the certificate issued under section 11 of the Central Excises and Salt Act 1944 authorising the Collector of Belgaum to recover the amount as arrears under the Land Revenue Code. The Learned Judge himself seems to have realised this when in paragraph 13 dealing with the question of limitation, he

Judgment at Sec. B.

holds that the suit is not time barred under ssettnn 40(2) as it was filed within the prescribed period of limitation from the date of 10th December 1944 which is the date of issue of the certificate under section 11 and which, as the learned Judge himself says, is the order which forced the plaintiff to seek his remedy in the Civil Court. The plaintiff's liability to pay the differential duty is identical under both the Acts. (Vide item No. II(2) of the Schedule to Tobacco (Excise Duty) Act,1943 and item No. 9(II) of the Schedule to the Central Excises and Salt Act, 1944). That being so, it might be argued with plausibility, that the cause of action was based upon an order passed under the Act of 1944 and consequently section 40(1) operated as a bar to the suit.

The lower Court also rejected the plea that there was an implied bar of jurisdiction under section 35 of the Act of 1944 (para. 16). On this point the Court holds thus "Even assuming that Rule 213(of the Central Excise Rules 1944) is applicable there is nothing in the Act of 1944 and in the Rules (provided section 40 is not a bar) that the plaintiff must exhaust all the appeals before we can sue in a Civil Court". This reasoning is misconceived. The effect of section 35 read with section 40 is that the plaintiff's only remedy is by way of an appeal. This question has been discussed in para. 2(b) of the grounds of defence in the brief. It is presumed that the Govt. Pleader had invited the court's attention to the authorities cited in that paragraph. The Court has however not referred to any of those authorities.

On merits, we do not seem to be on very firm

ground. In this case the differential duty was levied because (1) the tobacco was exported to Goa (foreign territory) and (2) because although described and admitted to be "chewing" tobacco it was also capable of being used for the purposes of bidies or snuff. The learned Judge has held - and probably rightly - that there is no provision in law that because it was exported to Goa it was liable to maximum duty even though it was of chewing variety. The second question viz. whether it could also be used for the purposes of bidi or snuff, was one of fact depending on evicence, the burden of proving which was correctly thrown on Government. The learned Judge has however rejected the evidence led on behalf of the Central Govt. and held that the defence had failed to prove that the tobacco was liable to the maximum rate of duty. On facts therefore it is difficult to say whether the appeal will succeed or not.

On the point of jurisdiction however it seems desirable to prefer an appeal. For orders.

RM
17/2/47.

A.L.R. Reply may be:-

On merits Govt has no good case, on the point of jurisdiction the case is arguable, but it is not possible to say what view the High Court will take.

RK 18/2

R.L.A

D E C R E E.

In the Court of the Civil Judge, Senior Division,

At Belgaum.

Exh. 80.

Reg. Civil Suit No. 288 of 1945.

1. Shankar Shiddappa Kore, age 35, caste Lirgayat, occupation trade and agri.,
2. residing at Ankali, Tal.Chikodi ..... Plaintiff

Against

1. The Central Government of India, Delhi, i.e. the Governor General in Council ..... Defendant.

Claim: Rs. for courtfee Rs. 230/-
for jurisdiction Rs. 9568-14-0

Plaintiff sues as follows:-

1. The plaintiff being a commission agent of various customers in British India, Native States and Goa, received orders from merchants in Goa in about April, or May,1943, for sending chewing tobacco to Goa via Castle-Rock. He therefore applied to the Assistant Collector, Central Excise, Kolhapur Division for transport permits under Rule 14 of the Tobacco (Excise Duty) Rules,1943, in respect of the consignment of chewing tobacco, which the plaintiff purchased as commission agent for the said Goa merchants, and the Sub-Inspector of Ankali, Central Excise, (whose designation has been since changed as Range Officers, Ankli Range, Central Excises). Accordingly served the plaintiff three T.D.1 Notices bearing S.Nos. 18744,18745 and 18746 dated respectively 10.5.1945, 12.5.1945 and 12.5.1945 for payment of duty under the Tobacco (Excise Duty) Act, 1943, after getting three tobacco consignments of 9861 lbs., 10799 lbs. and 99311 lbs. weighed in his presence on the above said respective dates, which after an examination of the variety in each of the said consignments of the time time of the weighing, was accepted by the said Sub-Inspector as a variety for chewing purposes, denoting in the said notices the amount of duty at Rs. 616-5-0, Rs. 674-6-0 and 620-11-0 respectively and the variety as chewing tobacco and informing the plff. that on production of Treasury receipts in token of the payment of the said duty into the Chikodi Sub-

Treasury within 10 days thereof, the plff. should apply for permits to remove the goods presumably as provided in Rule 14 of the Tobacco (Excise Duty) Rules,1943. Plff. accordingly paid the said amounts into the Chikodi Sub Treausry respectively on 20.5.1943, 22.5.1943 and 22.5.1943 and on applicatior made by the plff. to the Sub-Inspector Ankli, for transport permits, he granted three permits, in form T.P.1 authorising the plff. to transport the three consignments to Goa via Castle-Rock. These three consignments were accordingly transported to Goa via Castle-Rock about the end of May,1943.

2. Then the same Officer (Sub-Inspector) of Ankli purported to issue again on 24.8.1943 three notices in Form T.D.1 in respect of the three abovesaid consignments demanding payment of "differential duty at the rate of 5 annas per Lb." amounting respectively to Rs. 3081.9.0 and Rs. 3171.14.0 and 3103.7.0 mentioning in the Assessment particulars against the item variety as "chewing exported to Goa". Plff. then made a reference to the Inspector of Central Excise, Chikodi Circle, in his letter dated 31:8.1943 asking him under what authority, the three consignments which were properly allowed to be transported to Goa under legal permits were liable to excess duty and informed him that until and unless this was made clear, plff. was not willing to pay the so-called differential duty. To this the said Officer avoided giving a proper reply in writing through the Sub-Inspector, Ankli, orally informed the plff. that the said three consignments were liable to duty at six annas per lb. because of their transport to Goa as per Circular issued to all tobacco officers by the Central Board of Revenue in July, 1943. The said Circular is not only illegal and ultra vires but could not at any rate be given retrospective effect as three consignments in question had been transported to Goa long before the receipt of the said Circular. Then as the Circle Officer Chikodi issued a notice dated 22.3.1944 to the plff. requesting the plff. to pay the so-called differential duty he made

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he made an application dated the 2nd April,1944, to the Collector of Salt Revenue, Bombay through the Range Officer, Ankli requesting him not to levy the duty but that application was not forwarded to the Collector at all. Then the plff. made an application date 1.5.1944 to the Collector of Salt Revenue directly again, through the plff.'s advocate bringing to his notice all the points in regard to the illegality of the demand. That application was sent to the Additional Collector for disposal who intimated to the plff.'s advocate in his communication No. T.Ex. 13/243 dated the 10th June,1944, that the differential duty at 5 annas per lb. was payable by the plff. in respect of the above-said 3 consignments as the duty of one anna per lb. originally levied was short levied by the Range Officer, Ankli, through misdeclaration on the part of the plff. that Rule 79 of the Tobacco (Excise duty) Rules applied, that as the plff. failed to pay the differential duty, he committed a breach of the said rule which is an offence punishable under Rule 82 of the said ~~xxxxx~~ rules read with Sec. 10 of the Tobacco (Excise Duty) Act,1943, and that the plff.'s application dated 1.4.1944 could not be considered unless the duty of Rs. 9586-14-0 was paid by the plff. in accordance with Sec. 189 of the Sea Customs Act,1878, Then the plff. submitted a reply through his advocate to the Addl. Collector in his letter dated 16th June,1944, that Rule 79 had no application in regard to the sadd three consignments of chewing tobacco as that rule does not cover cases of mis-declarations at all supposing that there was a misdeclaration on the part of the plff. and that T D.1 notices dated 24.8.1943 were illegal and unauthorised, that neither Sec. 10 of the Tobacco (Excise Duty) Act,1943, nor Rule 82 of the abovesaid rules applied and that the plff's application dated 1.5.44 might be considered and decided without insisting on the prepayment of the differential duty, But the Addl. Collector, in his communication No. T.Exh. 13.243 dated 22.6.1944 refused to consider the various legal points raised in his application dated 1.5.1944, unless the differential duty was paid. The plff's advocate again addressed another letter dated 30.6.1944 to the Addl. Collector requesting him not to

treat the plff's application dated 1.5.44 as an appeal as no appeal was competent to the Collector under Sec. 35 of the Central Excise and Salt Act, 1944 read with rule 213 of the Central Excise Rules, 1944 but to consider the points raised in paragraphs 1 and 2 of the abovesaid application dated 1.5.1944 and to pass such orders as he thought fit. It was also requested that a copy of the orders might be furnished to the plff. by V.P.P. But the Addl. Collector did not give any reply to this letter of 30.6.44 nor did he supply the certified copy of his orders. But in reply to the plff's petition, dated 4.10.44, sent through the Assistant Collector, Kolhapur Division, the Addl. Collector refused to supply a copy of his orders on the untenable ground that it formed part of official correspondence. In the meanwhile, the plff. received on 3rd October, 1944 from the Circle Officer, Chikodi, a notice dated 1.10.1944 to show cause why action should not be taken against the plff. under Rule 7 of the Central Excise Rules, 1944, and that if sufficient cause was not shown within 10 days of the receipt of the said notice or if the duty of Rs. 9556-14-0 was not paid into the Government treasury within the said period of 10 days action should be taken against the plff. under the said Rule and the plff. would be liable to pay the penalty which may extend to Rs. 2,000/-. Then the plff. showed cause in his objections dated 9.10.1944 to the Circle Officer, Chikodi. The Asstt. Collector, Central Excise, Kolhapur Dn. to whom the show cause notice proceedings appear to have been sent for orders passed on 13.10.1944 without considering the verious legal points raised in the said objections dated 9.10.1944, finding the plff. guilty of the offence under the said rule and requiring the plff. to pay a penalty of Rs. 25/-. Plff. however deposited the said amount under protest on 29.11.1944. Being aggrieved by the said orders of penalty which is illegal and ultra vires the plff. submitted an appeal on 19.2.44 to the Collector of Salt Revenue, Bombay under Rule 213 of the Central Excise Rules, 1944, in which the plff. made a strong grievance that the Asstt. Collector

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Kolhapur Division wrongly found the plff. guilty without considering the various legal points raised in the plff's objections dated 9.10.1944 and without deciding whether and under what act of different catagories Rule 79 of the Tobacco (Excise Duty) Rules,1943, the levy at the increased or differential dity could be included and supported through the plff. challenged the application of the said rule to the e three consignments in question. But inspite of the plff's prayer in the memo of appeal preferred against the levy of penalty of Rs. 25, that the appeal should not be transferred to the Asstt. Collector on the ground that he had already dealt with the matter on a previous occasion as detailed above and the plff. had made comments upon his previous orders, the Collector transferred the appeal to the Addl. Collector who has in his communication No. T.Ex. 13/243 dated 28.12.1944 intimated to the plff's Advocate that the Collector cannot decide the appeal as an appeal against the orders of the Asstt. Collector lies to the Central Board of Revenue under Rule 213 read with Sec. 35 of the Central Excise and Salt Act,1944. The plff. does not believe that the Addl. Collector could not be unaware of the plain meaning of Rule 213, which provides in clear terms that an appeal against the orders of an Asstt. Collector lies to the Collector and if between the date of the order or decision and the date of the hearing of the appeal the officer who passed the order is promoted to be the Collector the appeal shall lie to the Central Board of Revenue. As a matter of fact the Asstt. Collector while sending to the plff. a copy of the order appealed against has intimated to plff. that an appeal lies to the Collector Mr. A.S.Kyte, M.B.E., Asstt. Collector of Central Excise Dn. who passed the order against the plff. preferred an appeal dated 19.12.1944 ~~xgxi~~ to the Collector was not promoted to be the Collector at all. Plff 's grievance therefore is that all the officers of the Central Excise Department from the lowest rank to that of the Collector in this Presidency have purposely refused to consider the various legal points raised by the plff. in all his applications, letters

of objections and appeal mentioned above and have been more anxious to levy the heavy duty of Rs. 9556-14-0 from the plff. for the obvious reason that an anxious and impartial consideration of the same might lead to an order favourable to the accd. They have failed to observe the principes of natural justice including full opportunity of being heard and an impartial consideration of the various points presented by those affected by the order and a liberal constructions of fiscal enactment in favour of the subject etc, para 3. They have also failed to take into consideration among others the following facts, viz.

a) The three consignments in question were purchased by the plff. as a commission agent on a small commission for the Goa customer and not as a trader making huge profits.

b) The differential duty demanded is very heavy and as the demand was made by the Central Excise Department long after the goods reached the customer to Goa via Castle-Rock, it was not and is not even now possible for the plff. to recover the heavy duty from the customer at Goa where the law is diffenent.

c) The variety of tobacco in the three consignments in question was chewing. It was so accepted by the Sub-Inspetor of Ankli at the time of his weighing the tobacco in the 3 consignments on 10.5.1943 and 12.5.1943. In the T.D.1 permits issued by the said Sub-Inspector in respect of the same after payment of duty as demanded by him, the variety of the tobacco therein was also accepted by him as chewing. Nay even in the T.D.1 Notices dated 24.8.1943 in respect of the same which are thef foundations of the demand the Central Excise Officers have described the tobacco as chewing. Moreover the Central Excise Officers from the lowest rank to that of Collector of Salt Revenue have not disputed the fact that the variety of the tobacco in the three consignments was chewing nor have they instituted an incuiry in Goa Territory to the knowledge of the plff. by tracing the tobacco sent in the three consignments and establishing by reliable evidence that the variety was other than chewing.

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In these among other circumstances, the deft. is estopped from contending that the variety of tobacco was other than chewing. Hence, the demand of the differential duty at 5 annas under T.D.1 notices dated the 24th August,1943, is illegal and ultra vires.

4. Rule 79 of the Tobacco (Excise Duty) Rules,1943, has no application to the three consignments in question as it was not even hinted by any of the Central Excise officers from the Collector to Range Officers that the duty levied at 1 anna per lb. as per T.D.1 Notices, dated 10.5.1943, and 12.5.1943 was short levied in respect of the same through inadvertance, error or misconstruction on the part of an officer or through misstatement as to quantity on the part of the owner (to quote the word of the rule). Hence, the Sub Inspector of Ankli has no jurisdiction or legal authority to again issue T.D.1 notices dated 24.8.1943. Hence the demand thereunder is illegal and ultra vires.

5. Even supposing without admitting that Rule 79 applied, said three T.D.1 notices dated 24.8.1943, are illegal and ultra vires. Rule 79 is qualified by rule 85 of the said rule under the Collector or the Addl. Collector alone and no other Central Excise Officer subordinate to him could adjudge the increased duty amounting to more than Rs. 250/-. The fresh issue of the abovesaid T.D.1 notices by the Sub-Inspector of Ankli without such adjudgement was also illegal and unauthorised and null and avoid. Even supposing that there was such adjustement, it was null and void having been made without giving the plff. an opportunity of being heard.

6. Plff. understands that the Central Excise Officers are attempting to recover the demanded duty of Rs. 9556-14-0 from the plff. by coercive measures and has already illegally recovered penalty of Rs. 25/- purporting to be under Rule 7 of the Central Excise Rules,1944. As both the both demand of the said duty and recovery of penalty are illegal and ultra vires, the plff. is obliged to file this suit against the deft. for a declaration to that defect and a permanent injunction to the deft. enjoining

the deft. not to recover the said duty from the plff and for refund of Rs. 25/- deposited by the plff. into the Chikodi Sub Treasury on 29.11.1944 and illegally recovered from the plff.

7. The cause of action for the suit arose in December,1944, when the plff. learnt that the Collector of Belgaum had been moved to recover the said ~~xxxxxx~~ duty from the plff. by coercive measures and on 29.10.44 wher the plff. deposited Rs.25/- into the Sub Treasury on 29.11.1944, and the Collector of Salt refused on 28.12.1944 to refund the said amount to the plff.

8. The value of this suit claim for court fee is Rs. 200/- for declaration and Rs. 5/- for injunction and Rs. 25/- for the amount claimed, in all Rs. 230/- on which court fee of Rs. 21-9-0 is paid and for jurisdiction it is Rs. 9556-14-0.

9. This court has jurisdiction to try this suit as the suit is against the Central Government and as the cause of action arose at Ankli in Chikodi Taluka within the special jurisdiction of this Court.

10. The plff. therefore, prays as follows:-

1) It be declared that the levy of duty of Rs. 9556-14-0 on the plff. and the recovery of Rs. 25/- by way of penalty as aforesaid is illegal and ultra vires and null void.

2) A permanent injunction be issued to the deft. not to recover the said duty from the plff. by coercivem measures through the Collector of Belgaum.

3) A sum of Rs. 25/- which the plff. deposited in the Chikodi Sub-Treasury under protest as a peralty be ~~xx~~ refunded to the plff. from the deft.

4) Such other relief as the plff. is entitled be granted.

5) Costs of this suit from the deft. be allowed.

6) Future interest on Rs.25/- be awarded to plff. from the deft. from date of suit till satisfaction.

The suit coming on this day before D.F.Ugrankar, Esq. Civil Judge, Senior Division, in the presence of Messrs. B.H.Deshpande, and S.G.Chandavarkar pleaders for the plff. and Mr. B.V.Jakati pleader for the deft., it is ordered that:

Declared that the levy of additional duty of Rs. 9556-14-0

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as per demand notices, Exhs.46 to 48 and the threatened recovery thereof, vide Exh. 62, and the imposition and recovery of the peralty of Rs. 25/- vide Exh. 57 and Exhs. 62 and 49 are illegal and ordered that the deft. be, and is hereby, restrained from recovering the said amount from the plff. and do refund to the plff. the amount of Rs. 25/- and do pay the costs of the plff. and bear this own costs.

Bill of costs.

	Plffs. Rs. as.p.	Deft. Rs. as.p.
1. Stamp for the plaint...	21- 9-0	-
2. -do- for power	0-10-0	-
3. -do- for applications	7- 8-0	5-10-0
4. Witness potgi.	85- 0-0	9- 0-0
5. Pleader's fees(in double set)	564- 0-0	282- 0-0
6. Process fees	20- 0-0	2- 8-0
Rs.	708-11-0	299-2-0
Rejected cost for applns."	4- 6-0	3-12-0
Total Rs.	704- 5-0	295- 6-0

Given this 23rd day of December, 1946, under my signature and the seal of the court.

Seal.

Sd/- D.R.Ugrankar
29.1.1947
C.H., S.D.

Sd. G.R.Kulkarni
Clerk.
Sd. B.H.Deshpande pl. for plff.
Sd. B.V.Jakati p. for deft.
28.1.1947.

****

NS:27:2.

No.OS.288/45.
Belgaum, 18/20/2/1947.

Copy forwarded with compliments to the Collector of Central Excise, Bombay, in continuation of this office even No. dated 11-1-1947.

Sd/- B.V.Jakati.

Dist. Government Pleader, Belgaum.

BELGAUM CIVIL SUIT NO. 288 OF 1945.

Chronological Statement of Facts.

1. This is a suit against the Central Government for a declaration that the levy of tobacco duty of Rs. 9,556-14-0 and the recovery of Rs. 25 from the plaintiff as penalty for failure to the duty are illegal and *ultra vires* and for a permanent injunction restraining the defendant from recovering the said amount of duty by coercive measure and for refund of Rs. 25 paid under protest by plaintiff as penalty.

2. The plaintiff who is a licensed wholesale dealer in tobacco and a holder of a private bonded warehouse license cleared between the 26th and 28th May 1943 the following quantities of tobacco as intended for sale as chewing tobacco, on payment of duty at the rate of one anna per pound [*vide* item No. II (2) of the Schedule to Tobacco (Excise Duty) Act, X of 1943, now replaced by Item No. 9 (II) (2) of the Schedule to the Central Excise and Salt Act, I of 1944] :—

	Quantity.	Date of clearance.
	10,790 lbs.	26th May 1943.
	9,931 lbs.	26th May 1943.
	9,861 lbs.	28th May 1943.
Total ...	30,582	

Notices of demand in Form T.D. 1 for payment of tobacco duty in respect of these quantities at one anna per pound were issued by the Sub-Inspector of Central Excise (now Range Officer, Central Excise) to the plaintiff on 10th May 1943 and 12th May 1943 and plaintiff paid the duty in the Sub-Treasury at Chikodi on 20th May 1943 and 22nd May 1943. In all the three notices the variety of tobacco was shown as " chewing."

3. The plaintiff exported these quantities to Goa under transport permits in Form T.P. I. issued to him on 26th May 1943 and 28th May 1943 by the Sub-Inspector, Central Excise. As this tobacco could also be used for the purposes of *biri* or snuff it was liable to duty at the rate of six annas per pound [*vide* Item No. II (1) (*b*) and (*e*) of the Schedule to Act X of 1943 corresponding with Item No. 9 (II) of the Schedule to the Act I of 1944]. Hence on 24th August 1943, the Sub-Inspector, Central Excise, issued to the plaintiff, three demand notices in Form T.D. I. requiring him to pay differential duty at the rate of five annas per pound in respect of these consignments within ten days from the date of the notices.

4. As the plaintiff did not pay this amount the Circle Officer, Central Excise, at Chikodi, sent a notice dated 22nd March 1944 calling upon him to make the payment.

5. On 1st May 1944, the plaintiff submitted a petition of appeal addressed to the Collector of Salt and Revenue. Therein he contended *inter alia* that the notices demanding differential duty from him were illegal, that the tobacco exported by him had been accepted by the Central Excise Officers as of chewing variety and therefore the notice of demand should be cancelled.

6. On 10th June 1944, the Additional Collector of Central Excise informed the plaintiff's pleader that the demand notices claiming differential duty at the rate of five annas per pound had been issued under rule 79 of the Tobacco (Excise Duty) Rules on account of the tobacco having been assessed at a lower rate through misdeclaration on the part of the plaintiff, that by failing to comply with these notices, the plaintiff had committed an offence punishable under rule 82 of the Tobacco (Excise Duty) Rules read with section 10 of the Tobacco (Excise Duty) Act and therefore it was necessary for him to deposit the amount of duty demanded from him, in accordance with section 189 of the Sea Customs Act, 1878, as applied to central excises by rule 215 of the Central Excise Rules, 1944.

7. On 16th June 1944, the plaintiff's pleader sent another petition to the Additional Collector stating that " misdeclaration " on the part of the plaintiff did not come within rule 79, that the appeal dated 1st May 1944 had been made with a view to obtaining the Collector's decision whether the demand notices were valid or not, and that therefore it was not necessary for the plaintiff to deposit the amount demanded from him.

8. On 22nd June 1944, the Additional Collector informed the plaintiff's pleader that the appeal could not be considered until the plaintiff deposited the amount of Rs. 9,556-14-0.

9. On 30th June 1944, the plaintiff's pleader made another application contending that his petition dated 1st May 1944 could not be treated as an appeal and that if it could not be considered without the deposit of the amount demanded, he may be furnished with two copies of the order in that behalf to enable the plaintiff to appeal to the Central Board of Revenue.

10. On 11th July 1944, the Additional Collector requested the Assistant Collector, Central Excise, to take steps against the plaintiff under rule 7 of the Central Excise Rules, 1944, impose on him a penalty and also take steps for recovery of the amounts of duty and penalty as arrears of land revenue. Accordingly, on 13th October 1944, the Assistant Collector passed an order directing the plaintiff to pay penalty of Rs. 25 *plus* Rs. 9,556-14-0 claimed under the three different T.D. notices within a period of fifteen days.

11. After some more correspondence between the plaintiff' pleader and the Additional Collector a certificate under section 11 of the Central Excises and Salt Act, 1944, was issued on 10th December 1944 to the Collector of Belgaum for the realisation of the dues from the plaintiff.

12. On 19th December 1944, the plaintiff made a petition of appeal to the Collector of Salt and Revenue against the Assistant Collector's order, dated 13th October 1944. In reply the Additional Collector informed him that the appeal lay to the Central Board of Revenue under rule 213 of the Central Excise Rules read with section 35 of the Central Excise Act, 1944, and that it would be necessary for the plaintiff to deposit the amount of duty if he wished his appeal to be considered by the Board.

13. On 30th January 1945, the plaintiff gave notice of suit and on 20th July 1945, he filed this suit in the Court of the Civil Judge, Senior Division, Belgaum.

Grounds of defence.

1. *Frame of suit.*—The plaintiff has impleaded " the Central Government of India, Delhi," as the defendant in this suit. The suit being against the Central Government the authority to be named as the defendant must be " the Governor-General in Council before the establishment of the Federation of India " [*vide* section 79 (*a*) of the Civil Procedure Code]. The suit is therefore not maintainable in this form.

2. *No jurisdiction.*—(*a*) The plaintiff seeks relief against the Assistant Collector's order dated the 13th October 1944 by which he was directed to pay a penalty of Rs. 25 *plus* Rs. 9,556-14-0 on account of differential duty. The order was passed under rule 7 of the Central Excise Rules, 1944, framed under section 37 of the Central Excise and Salt Act, 1944. The jurisdiction of the Civil Court to entertain this suit is therefore barred under section 40 of the aforesaid Act, which enacts that no suit shall lie against the

Central Government or against any officer of the Crown in respect of any order passed in good faith or any act in good faith done or ordered to be done under this Act.

(*b*) If, for any reason it is held that section 40 does not apply, this is nevertheless a clear case of implied exclusion of the right to file a suit. Rule 86 of the Tobacco (Excise Duty) Rules, 1943, which were in force when the differential duty was first demanded from the plaintiff, provided for an appeal to the Collector from any order of an officer subordinate to him, and to the Central Board of Revenue from any original order of the Collector. These Rules have now been repealed and replaced by the Central Excises and Salt Act and the Central Excise Rules, 1944, which were in force when the Assistant Collector passed his order in question against the plaintiff. Under section 35 of the Act any person deeming himself aggrieved by any decision or order passed by a Central Excise Officer under the Act or the Rules thereunder may appeal therefrom to the Central Board of Revenue or in such cases as the Central Government directs to any Central Excise Officer not inferior in rank to an Assistant Collector of Central Excise and empowered in that behalf by the Central Government. Under rule 213 of the Central Excise Rules an appeal against an order or decision of an Assistant Collector lies to the Collector to whom such Assistant Collector is subordinate. Finally, under section 12 of the Central Excise and Salt Act, and rule 215, the provisions of section 189 of the Sea Customs Act, 1878, have been made applicable *mutatis mutandis* in regard to offences in respect of duties imposed on goods under section 3 of the Act. Under section 189, a person desiring to appeal against a decision or order relating to any duty or penalty leviable in respect of any goods, must, pending the appeal, deposit the amount demanded by the officer passing such decision or order. It is perfectly clear from these provisions that the Assistant Collector's order related to the duty and penalty leviable in respect of tobacco and that being so, the only right to challenge this order is by way of an appeal after depositing with the Collector of Central Excise, the amount demanded from the plaintiff. A long course of decisions has established the well-known principle that " where by an Act of the Legislature powers are given to a person for a public purpose from which an individual may receive injury, if the method of redressing the injury is indicated by the statute, the ordinary jurisdiction of Civil Courts is ousted and a suit does not lie." In other words " where a liability not existing at common law is created by statute which at the same time give a special and particular remedy for enforcing it, the remedy provided by the statute must be followed ", and it is not competent to the party to proceed by an action at common law. [*See* Wolverhampton New Waterworks G. V. Hawkesford (1859) 120 : Revised Reports p. 151–157 ; Secretary of State *v.* Mask and Co., I.L.R. 1940, Mad. p. 599 (P. C.); Secretary of State *v.* Jagannadhan, I.L.R. 1941, Mad. p. 850–859]. If, therefore, the plaintiff was injured by the Assistant Collector's order, his only remedy was by way of an appeal as provided by the provisions of law hereinbefore referred to. It is true that the plaintiff did ultimately prefer an appeal (dated 19th December 1945) to the Collector, but that appeal was incompetent because the plaintiff did not comply with the provision of section 189 of the Sea Customs Act, 1878, by depositing with the Collector of Central Excise the amount demanded from him. Incidentally it will have to be concerned that the plaintiff was in order in preferring the appeal to the Collector of Central Excise and not to the Central Board. The view taken by the Additional Collector in the first paragraph of his letter No. T. Ex. 13-243, dated 26th December 1944,

is wrong. Under section 35 of the Central Excise and Salt Act, 1944, read with rule 213 of the Rules thereunder an appeal against an order of the Assistant Collector lies to the Collector. *Prima facie* the order appears to have been passed by the Assistant Collector in exercise of the authority vested in him by law and the plaintiff was not bound to present his appeal to the Central Board, simply because the Assistant Collector passed his order in accordance with the directions given to him by the Additional Collector. In fact under rule 213, it is the Collector and not the Central Board who has jurisdiction to hear an appeal against an order of an Assistant Collector. The point is however immaterial because in any event the Collector could not have entertained the appeal on account of plaintiff's failure deposit the amount of duty demanded from him which is a condition precedent to the hearing of any such appeal. For these reasons, it should be urged that the Court has no jurisdiction to entertain this suit.

3. *Merits.*—The suit is liable to be dismissed merely on the preliminary point of jurisdiction. If necessary, however, it should be contended that even on merits the demand for differential duty can be justified. The plaintiff objects to the payment on the following grounds viz. (1) Rule 79 of the Tobacco (Excise Duty) Rules under which the demand notices dated 24th August 1943 were issued does not apply to the consignment in question because there was no misstatement by the plaintiff as to the quantity of those consignments which were weighed by the Range Officer as admitted by him in his previous T.D.I. notices; nor was there any inadvertence, error or misconstruction on the part of the Range Officer when he demanded the duty at one anna per pound. (2) Assuming that rule 79 applies, it is subject to rule 85, under which the Collector alone is empowered to adjudge increased duty exceeding two hundred and fifty rupees. The Range Officer had no such power and consequently the demand notices of 24th August 1943 are *ultra vires*. (3) In all the T.D. I. notices the tobacco was accepted by the Central Excise Officers to be of the chewing variety. The Central Government is therefore estopped from contending that the variety of the tobacco was other than chewing. These contentions should be answered in the following manner.

4. The duty of one anna per pound on the plaintiff's tobacco appears to have been levied under rule 14 of the Rules of 1943. Under rule 79, when duty has been short levied through inadvertence, error or misconstruction on the part of an officer, or through misstatement as to quantity on the part of the owner—the person chargeable with the duty so short levied—shall pay the deficiency on demand being made with the period specified. It may be conceded that there was no misstatement as to quantity on the part of the plaintiff. It is, however, pointed out by the Central Excise Officers that this tobacco could also be used for the purpose of *biri* or snuff and was therefore liable to higher rate of duty at 6 annas per pound as provided in the Schedule of the Act. When tobacco can be used for more than one purpose it is essential to guard against loss of revenue due to diversion of tobacco to a use other than that for which it declared to be intended. In the present case not only was the tobacco capable of being used for more than one purpose but it was also exported to Goa (a contigous foreign country) and there being n that case no method of checking its subsequent use, the tobacco was liable to be assessed for duty at the maximum rate provided by law. The District Government Pleader is request d o co sult the local Ce ıtral Excise Officers and to lead such evidence as may be necessary to prove that th s tobacco could also be used for *biri* and snuff and was therefore liable to be assessed at the higher rate. His attention is also invited to paragraphs 32, 33A and 34

of the Manual of Departmental Instructions on Tobacco (Excise Duty) published by the Central Board of Revenue. This reference is made for the District Government Pleader's own guidance and information when considering the evidence to be led on behalf of the Government. The Manual which contains only instructions to Excise Officers should not be cited in the Court as an authority. It should be contended after having led this evidence that the duty of one anna per pound was short levied through error and inadvertence on the part of the Range Officer and hence the plaintiff is liable to pay the differential duty under rule 79.

5. The contention that rule 79 is subject to rule 85, is untenable. Rule 85 applies to cases in which anything is liable, *inter alia*, to increased rate of duty. It would, for instance, be applicable to cases in which duty which was correctly assessed in the first instance became subsequently liable to be assessed at a higher rate. Rule 79 on the other hand is applicable to cases in which an article which was liable to be assessed at a particular rate has through inadvertence, error etc. been assessed at a lower rate. This distinction is clearly borne out by the language of the two rules. Rule 79 makes provision for the recovery of the amount of deficiency when duty has been short levied. Rule 85 is therefore irrelevant for the purpose of the case.

6. The contention as regards estoppel is also misconceived and therefore untenable. If the duty was short levied Government had the statutory right under rule 79 (now rule 10 of the Central Excise Rules) to recover the deficiency and the mere fact that the tobacco was stated through mistake to be of chewing variety in the demand notices will not estop Government from proceeding under rule 79. This is based on the principle that no estoppel can be pleaded against the directions and prohibitions enacted by the statute and against the right accruing to any party by reason of such directions. (I.L.R. 38 Mad. 519) : Besides, the acts of a Government Officer bind Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceed that authority, when Government directly or by implication ratified the excess (Collector of Masulipatam *v.* Cavaly Venkata, 8 M.I.A. 529 at 554). In this case the act of the Sub-Inspector of Central Excise in assessing the duty at a lower rate when the tobacco was clearly liable to be assessed at the maximum rate was in excess of his authority and was not ratified by Government either expressly or by implication. Moreover, the case of Government is that the tobacco could also be used for the purposes of *biri* or snuff and not merely for chewing and was for that reason liable to be assessed at 6 annas per pound. The principle of estoppel does not therefore apply in this case.

7. The last point urged by the plaintiff is that the differential duty demanded is very heavy and the demand is made long after the consignments had reached Goa and when it was not possible for the plaintiff to recover that amount from his customer at Goa where the law is different. The demand for the duty short levied was however made within three months which is the period specified in rule 79 and is therefore legal. Plaintiff's alleged inability to recover the amount from his customer in Goa cannot affect the correctness of the demand. This contention is therefore irrelevant.

8. It should therefore be urged that the suit must be dismissed with costs.

9. The notice of the suit was not included in the papers of the case. The District Government Pleader should take steps to obtain a copy of it and satisfy himself whether it is in accordance with the provisions of section 85 of the Civil Procedure Code. He should also move the Court for framing a preliminary issue on the question of jurisdiction.

138

S. Belgaum – 147
(Nehb file)

Pl. shuffle the papers after punching & paging them properly & place the file to me.

Secy: 8/12

Asst Siddhaya

No.3599

Tele: 27193

Office of the
Government Pleader, High Court,

Bombay, 28th June 1950.

From,

Shri H. M. CHOKSI, B. A. (Hons.), LL. B.,
Government Pleader, High Court.

THE SECRETARY TO GOVERNMENT
LEGAL DEPARTMENT
File No. 11147
Date 30-6-50

To

The Remembrancer of Legal Affairs,
Bombay.

L. D.
29 JUN 1950

SUBJECT:— The First Appeal 175 of 1947.
In Civil Suit No.288/1945
Union of India - Shankar Sidappa Kore.

Sir,

In the above appeal the main question is as to whether the suit in respect of declaration and injunction against the Government in respect of excess duty leviable from the Plaintiff was barred under Section 40(1) of the Central Excises and Salt Act of India Act 1 of 1944.

The appeal came up for hearing today and I cantended on behalf of Government that no suit could be entertained by a Civil Court in respect of excess duties claimed by the Government from the Plaintiff in respect of tobacco since such a suit is barred under Section 40 Sub-Section 1 of India Act 1 of 1944.

The Section runs as under:

"No suit shall lie against the Central Government or against any Officer of the Crown in respect of any order passed in good faith or any act in good faith done or ordered to be done in this Act".

The Court (Shri Justices Bavdekar and Shah) put it to me that the Section mearly barred a suit for damages and not a suit of the nature mentioned above. The Court further put it to me that ~~this sort of~~ Section similar to this was being added to all recent legislation in order to indemnify public servants from suits for damages in respect of any act done by them in good faith.

The Court has adjourned hearing to Friday the 7th July 1950 and has directed and expressed a desire that I should ascertain (from you) whether it was a fact that clauses similar to Section 40 of Section 1 were being added in recent legislation in Bombay with a view to give protection to public servants against suit for damages in respect of acts done by them in good faith.

I was instructed to urge and argue that Section 40 sub Section 1 barred

All Civil Suits in respect of any duty or excess duty levied by the Central Government under the Central Excise and Salt Act 1944.

May I request you to send me your instructions in respect of the above and oblige?

A copy of the judgment of the Lower Court along with the grounds of appeal is sent herewith. The print may be returned when done with.

An early reply is solicited.

Yours faithfully,

H Meenakshi

Government Pleader, High Court.

Forwarded with compliments to:

The Collector of Central Excise, Bombay, for information and necessary action.

The Collector of Belgaum.

The District Government Pleader, Belgaum.

A. D.

Submitted with previous papers.

2. Attention is invited to pp. 101-105 of the file below where application of S. 40 has been considered.

3. As regards 'A' overleaf it is a fact that similar clauses are added in recent legislation of this Govt: pl see (1) Section 146 of the Prohibition Act; (2) S. 45(1) Khas Lands Act (3) S. 87, B'bay Tenancy & Agr. Lands Act; (4) S. 17(1) of Land Requisition Act.

29/6
30/6 I have already considered the applicability of S. 40(1) of Indian Act I of 1946 in my Note of 17-2-1947 and I cannot add anything AS. more to it. With respect, I am unable to follow the learned pr adv when they say that the Section bars only suits for damages.

63

I cannot see any justification for [illegible] limiting the scope of the section. The language of the section is perfectly plain. It affords protection to Government and Govt servant in respect of any order passed or any act done or ordered to be done in good faith. In this case the relief is sought against an order levying tobacco duty and penalty. Unless that order was not in good faith, the Central Government would be entitled to the protection under section 40(1) of the Act.

The information in para 3 of Mr. Rege's note may be communicated to the S.P. and, if necessary, he may also be further instructed in terms of my note of 17-2-1947 at P 101-105 of this file

RLW
30/6/50

HLA

Reply may be:—

1) Para 3 of Mr Rege's note

2) As regards the interpretation of section 40(1), the view taken by this Court appears to be the correct one - the observations of Vandalkamarg in (1937) Mad 211 (FB) 220) The point may be left to the High Court's decision

RK 3/7

I don't agree.
R.K.

R. L. A

G.P. acquainted me with this case on Saturday. Mr. Mehta may please discuss this with me on Tuesday.

R

3/7

G.R. 159/65

Jmkdi P. P.-(J) J 8—4000—6-49
G. O., L. D., No. 1193 dated 7-12-15

(Govt. Pl. H. C. Bom.—Spl. Form No. 2 e

No. 5142

From

THE GOVERNMENT PLEADER, HIGH COURT,

BOMBAY;

To The Remembrancer of Legal Affairs,
~~DISTRICT MAGISTRATE~~ Bombay.
~~COLLECTOR~~

Bomboy, 21st August 1950.

SIR,

Referring to your letter No. 2437

dated 11th March 1948 ~~1947~~, I have the honour to inform you that the Case noted in the margin was heard by the High Court on

First Appeal No.175/47 in C.S.288/45. The Union of India. VS. S.S.Kore.

7th July 1950 when the following order was passed:—

" The Court confirms the decree of the Lower Court and dismisses the appeal with costs. "

1. An uncertified copy of the High Court Judgment is sent herewith.

L. D. 22 AUG 1950

15724
23-8-50
A

Your most obedient servant,

Government Pleader, High Court.

L. D.

Submitted with pp.

2. The judgment of the High Court is sent. for inf. A copy of the judgment may be supplied to the Coll. of Central Excise..

24/8

AS The judgment has been appealed by the Central Govt. in the Supreme Court. As soon as a certified copy of the judgment is received, the matter will be placed before the Hon'ble Court for admission.

A

Re 25/8

A CR A may be done

R.L.A 25/8

Judgment recorded by the High Court in F.A. 175 of 1947.

....

The Govt. Pleader for the Appellants.

Shri G.R. Madbhavi Advocate for the Respondent.

Coram:- Bavdekar and Vyas, JJ.

7th July 1950.

Oral Judgment (Per Bavdekar J.):-

This is an appeal from a suit filed by the Respondent who has been ordered to pay excess duty amounting to Rs.9,000 in respect of tobacco, which he had sent to Goa. The tobacco was liable to duty, and at the time when it was exported to Goa, a levy of duty upon it was made, and the dispute between the parties is with regard to the excess duty which was ordered, when the Revenue Officers thought that they had realised less duty than what the respondent was liable to pay. In case there has been an escape from duty, which was leviable , there is power in the officers of the Excise Department to make an order assessing the deficit which was payable, and the Range Officer in this case assessed such a deficit, and made an order stating what was the duty which was leviable by him. He had also made an order levying a penalty of Rs.25, which penalty was recovered from the respondent on the 29th of November 1944. The respondent does not appear to have filed an appeal straightaway, but he went on corresponding with the superior officers; but they took the same view as the Range Forest Officer. There was one appeal which he filed, which needs to be mentioned for a reason which will become clear later on; but that appeal also was not prosecuted by him. The Collector to whom it was presented said that the respondent should, in the first instance, pay the excess duty which was sought to be levi- from him;but he did not pay it. and the Collector does

appear to have proceeded to dispose of the appeal. When after some time the Central Excise Officers attempted to levy the duty by issuing a notice on the 28th of December 1944, the respondent gave a notice under section 80 of the Civil Procedure Code, and he then filed the suit from which the present appeal arises, first, for recovery of Rs.25, which had been levied from him, and secondly, for restraining the Excise authorities from recovering the excess duty. The only defence taken on behalf of the Central Government of India, which was the defendant in the case, which it is necessary to state was (1) that the suit was barred by limitation under section 40(2) of the Excise Act, and (2) under section 35 of the Excise Act the jurisdiction of the Court is ousted.

Now, the order which was passed by the Range Officer calling upon the respondent to pay the excess duty was dated the 24th of August 1943. That is the date of the three notices, which were issued by the Range Officer calling upon the respondent to pay the excess duty; but nothing was done thereafter by any of the Excise authorities to recover the duty, and the respondent filed the suit only when ultimately another notice dated the 28th of December 1944 was served upon him calling upon him to pay it up, otherwise threatening issue of Court's process. The cause of action which the respondent relied upon was this receipt of the notices, and the threat that Court's process would be instituted in case he did not pay up. The cause of action, according to him arose upon the receipt of the notices, and if the cause of action arose upon the receipt of these notices, then, under any view of the case, the suit which was filed by the respondent would be in time.

The learned Government Pleader, who appears for the appellant, says that, if we view the cause of action arising on

was passed upon the appeal, the jurisdiction of the Court would be ousted. If at all an appeal had to be filed, it had necessarily got to be filed under the provisions of the rules under the old Act, which appears to have been the Tobacco (Excise Duty) Act, 1943.

The learned Government Pleader says, however, that the respondent cannot have it both ways. If he says that the cause of action had arisen to him before, and consequently the provisions of section 85 were inapplicable, his suit would be barred under the provisions of section 45(2) of the Central Excise and Salt Act, 1944. Now, that sub-section is in the following terms:-

> "No suit, prosecution, or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the Act or order complained of."

Mr. Choksey says that we should hold that the cause of action accrued to the respondent, when the Range Officer made an order levying excess duty, then, section 40 comes in the way. Now, section 40 undoubtedly bars in certain cases the suits; but as I have already mentioned, Act of 1944 came into force on the 28th of February 1944. But for that Act, it is not in dispute that the plaintiff's suit would be in time even upon the cause of action which had accrued to him on the 24th of August 1943. It is said, however, that that right of suit is taken away by section 40(2), on the ground that the ruling of that sub-section is a rule of procedure, and rules of procedure are always retrospective. Now, it is quite true that no one has got any vested right, in a rule of procedure, and the rule of limitation is a rule of procedure; but even here there are

are exceptions in which an Act of limitation will not be applied retrospectively, if the result of such application is to take away a vested right. If a statute enla-rges a period of limitation, no one has, of course, any grievance; but then if a statute reduces the period of limitation, a person will not be heard to say that he is affected thereby, if he has got a reasonable opportunity , after the coming into force of the statute, to file a suit, within the new period of limitation prescribed. But where the effectof applying new rule of limitation would be for the plaintiff to find that, immediately after the coming into force of the statute, his right was taken away, the new rule of limitation would not be applied. Six months from the 24th of August 1943 would expire on the 24th of February 1944, and if this rule of limitation was applied, if is obvious that, on the date upon which the plaintiff had no remedy left. It was pointed out in the decision of this Court in Khusalbhai v. Kabhai, 6 Bom.26, that the rule " that an Act or limitation, being a law of procedure, governs allproceedings , to which its terms are applicable, from the moment of its enactment, except so far as its operation is expressly excluded or postponed admits of the qualification that, when the retrospective application of a statute of limitation would destroy vested rights, or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, then the statute is not, any more than any other law, to be construed retrospectively. In our view, that principle must be applied to the present case Plaintiff's suit will not, therefore, be barred by limitation. On the footing that the cause of action arose on the 24th of Feb.

The appeal must be dismissed with costs.

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6/11/50

APPEAL No. 175 OF 1947 FROM ORIGINAL DECREE.

Union of India. (Original Defendant) ... ... Appellants;

versus

Shankar Siddappa Kore. (Original Plaintiff) ... ... Respondent.

Appeal against the decision of D. R. Ugrankar, Esquire, Civil Judge (Senior Division) at Belgaum, in Special Suit No. 288 of 1945.

The Government Pleader for the Appellants.

Shri G. R. Madbhavi, Advocate for the Respondent

(Coram :—Bavdekar and Vyas, JJ.)

7th July 1950.

Oral Judgment (*Per Bavdekar, J.*) :—This is an appeal from a suit filed by the respondent, who has been ordered to pay excess duty amounting to Rs. 9,000 in respect of tobacco, which he had sent to Goa. The tobacco was liable to duty, and at the time when it was exported to Goa, a levy of duty upon it was made, and the dispute between the parties is with regard to the excess duty which was ordered, when the Revenue Officers thought that they had realised less duty than what the respondent was liable to pay. In case there has been an escape from duty, which was leviable, there is power in the officers of the Excise Department to make an order assessing the deficit which was payable, and the Range Officer in this case assessed such a deficit, and made an order stating what was the duty which was leviable by him. He had also made an order levying a penalty of Rs. 25, which penalty was recovered from the respondent on the 29th of November 1944. The respondent does not appear to have filed an appeal straight way, but he went on corresponding with the superior officers ; but they took the same view as the Range Forest Officer. There was one appeal which he filed, which needs to be mentioned for a reason which will become clear later on ; but that appeal also was not prosecuted by him. The Collector to whom it was presented said that the respondent should, in the first instance, pay the excess duty which was sought to be levied from him ; but he did not pay it, and the Collector does not appear to have proceeded to dispose of the appeal. When after some time the Central Excise Officers attempted to levy the duty by issuing a notice on the 28th of December 1944, the respondent gave a notice under section 80 of the Civil Procedure Code, and he then filed the suit from which the present appeal arises, first, for recovery of Rs. 25, which had been levied from him, and secondly, for restraining the Excise authorities from recovering the excess duty. The only defence taken on behalf of the Central Government of India, which was the defendant in the case, which it is necessary to state was (1) that the suit was barred by limitation under section 40 (2) of the Excise Act, and (2) under section 35 of the Excise Act the jurisdiction of the Court is ousted.

Now, the order which was passed by the Range Officer calling upon the respondent to pay the excess duty was dated the 24th of August 1943. That is the date of the three notices, which were issued by the Range Officer calling upon the respondent to pay the excess duty ; but nothing was done thereafter by any of the Excise authorities to recover the duty, and the respondent filed the suit only when ultimately another notice dated the 28th of December 1944

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Total 6-6-0
Rupees six and annas six only.
Superintendent D. D.
2-11-1950
HK. 417/50

was served upon him calling upon him to pay it up, otherwise threatening issue of Court's process. The cause of action which the respondent relied upon was this receipt of the notices, and the threat that Court's process would be instituted, in case he did not pay up. The cause of action, according to him, arose upon the receipt of the notices, and if the cause of action arose upon the receipt of these notices, then, under any view of the case, the suit which was filed by the respondent would be in time.

The learned Government Pleader, who appears for the appellant, says that, if we view the cause of action arising on the 28th of December 1944, he would argue that section 35 of the Central Excises and Salt Act, 1944, applied, and under that provision, the jurisdiction of the Court would be ousted. Inasmuch as this is part of the second contention, which was relied upon on behalf of the Central Government, it would be convenient to dispose of it at this stage. That section came into force long after the dates of the original orders levying the excess duty. The Act of 1944 received the assent of the Governor General on the 24th of February 1944 and came into force on the 28th of February 1944. Now, in certain cases the Act does oust the jurisdiction of the Courts. It says that any person, if he is aggrieved by any decision passed by a Central Excise officer, then, he may appeal either to the Central Board of Revenue, or, in such cases as the Central Government directs, to any Central Excise Officer not inferior in rank to an Assistant Collector of Central Excise and empowered in that behalf by the Central Government. Then, sub-section (2) of the section says :—

> " Every order passed in appeal under this section shall, subject to the power of revision conferred by section 36, be final."

It is contended on behalf of the Government that, whenever any officer passes an order, the person who is aggrieved cannot go to Court. He must appeal, and if the appellate authority makes an order, then, there is no further tribunal to which he can go, except, of course, the Central Government, which has powers of revision under section 36. Now, the order in this case, as I have said, was made long before the Act came into force, and we cannot understand how section 35 can have application to those orders. There were indeed in the old Act provisions, by which an appeal could be filed ; but there was no provision that, in case an appeal was not filed, or in case an appeal was filed, but an order was passed upon the appeal, the jurisdiction of the Court would be ousted. If at all an appeal had to be filed, it had necessarily got to be filed under the provisions of the rules under the old Act, which appears to have been the Tobacco (Excise Duty) Act, 1943.

The learned Government Pleader says, however, that the respondent cannot have it both ways. If he says that the cause of action had arisen to him before, and consequently the provisions of section 35 were inapplicable, his suit would be barred under the provisions of section 40 (2) of the Central Excise and Salt Act, 1944. Now, that sub-section is in the following terms :—

> " No suit, prosecution, or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the Act or order complained of."

Mr. Choksey says that, if we hold that the cause of action accrued to the respondent, when the Range Officer made an order levying excess duty, then, section 40 comes in the way. Now, section 40 undoubtedly bars in certain cases the suits ; but as I have already mentioned, Act of 1944 came into force on the 28th of February 1944. But for that Act, it is not in dispute that the plaintiff's suit would be in time even upon the cause of action which had accrued to him on the 24th of August 1943. It is said, however, that that right of suit is taken away by section 40 (2), on the ground that the rule in that sub-section is a rule of procedure, and rules of procedure are always retrospective. Now, it is quite true that no one has got any vested right in a rule of procedure, and the rule of limitation is a rule of procedure ; but even here there are exceptions in which an Act of limitation will not be applied retrospectively, if the result of such application is to take away a vested right.

If a statute enlarges a period of limitation, no one has, of course, any grievance; but then if a statute reduces the period of limitation, a person will not be heard to say that he is affected thereby, if he has got a reasonable opportunity after the coming into force of the statute, to file a suit, within the new period of limitation prescribed. But where the effect of applying new rule of limitation would be for the plaintiff to find that, immediately after the coming into force of the statute, his right was taken away, the new rule of limitation will not be applied. Six months from the 24th of August 1943 would expire on the 24th of February 1944, and if this rule of limitation was applied, it is obvious that, on the date upon which the Act came into force the plaintiff had no remedy left. It was pointed out in the decision of this Court in *Khusalbhai* v. *Kabhai*, 6 Bom. 26, that the rule " that an Act of limitation, being a law of procedure, governs all proceedings, to which its terms are applicable, from the moment of its enactment, except so far as its operation is expressly excluded or postponed" admits of the qualification that, when the retrospective application of a statute of limitation would destroy vested rights, or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, then the statute is not, any more than any other law, to be construed retrospectively. In our view, that principle must be applied to the present case. Plaintiff's suit will not, therefore, be barred by limitation on the footing that the cause of action arose on the 24th of February.

The appeal must be dismissed with costs.

By order of the Court.

(Signed) S. H. BELAVADI,

Deputy Registrar.

True Copy

for Deputy Registrar.

The 3rd day of November 1950

BOMBAY: PRINTED AT THE GOVERNMENT CENTRAL PRESS.

K. 417/50
~~478/50~~

Typed by G.R.Desai
29/8/50
Examined by D.T.Patel
Read by V.D.Shah.

Copying applied for on 10-7-50
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Asstt Supdt
6/11/50

80 - 485

	Rs.As.Ps. Fls.5
Copying & Comparing charges.	1-14-0
Paper charges.	0- 0-3
Total	1-14-3

Rupee one, annas fourteen and pies three only.

Superintendent D.D.
31-8-1950

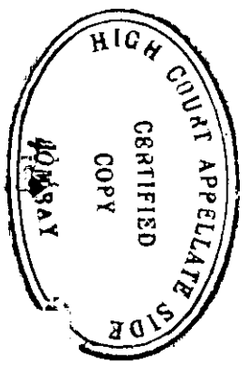
In the High Court of Judicature at Bombay

Friday the 7th day of July 1950.

Appeal No. 175 of 1947 from Original Decree.
~~The Central Government of India Delhi, i.e. the~~
Union of India ... ~~Governor General in Council~~ Appellant.
(Original defendant).

Versus

Shankar Siddappa Kore ... ... Respondent.
(Original Plaintiff).



* Amended vide Court's order dated 7-7-50 on C.A. 615/50.

Claim Rs. 230-0-0 for Court fees and
Rs. 9586-14-0 for Advocates' fees.

The plaintiff sued for a declaration that duty of Rs.9,556-14-0 sought to be recovered from him is illegal, ultra vires and null and void and for a permanent injunction restraining the defendant from recovering the amount and for refund of Rs. 25 recovered from him.

The Special Suit No. 288 of 1945 was decided by the Civil Judge (Senior Division) of Belgaum who decreed it with costs as detailed in the judgment.

An appeal has been admitted in the High Court from the decision of the lower Court Notice was ordered to issue by the Honourable Mr. Justice Bavdekar on the 15th day of July 1947.

The grounds of objection to the decision appealed against are :-

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1. That the learned Judge should have held that the misdescription of the defendant in the cause title was fatal to the suit.

2. That the learned Judge had no jurisdiction to hear the suit.

3. That it should have been held that no suit lay - against Government .

4. That it should have been held that the suit was - barred under section 40 of the Central Excise and Salt Act, 1944.

5. That the learned Judge should have held that the tobacco in question was dutiable at the rate of six annas per pound.

Coram :- Bavdekar and Vyas, JJ.

For the reasons given in the accompanying judgment, the Court confirms the decree of the lower court and dismisses the appeal with costs.

7th July 1950. Sd. S.H. Belavadi.

Deputy Registrar.

Bill of Costs in the High Court.

By the appellant.	Rs.As.Ps.
Stamps for Memorandum of Appeal.	21-9-0
Stamps for copies of decree and judgment.	1-14-0
Stamps for Vakalatnama (the Govt. Pleader)	0-0-0
Bhatta for process.	5-0-0
Sectioner's fee.	31-15-0
Advocate's fee.	281-11-0
Printing charges.	11-0-0
Copying charges for preparing paper books.	2-15-6
Copying fee under rule 111 of the High Court Appellate Side Rules. 1936.	24-0-0
Total	380-1-0

By the respondent	Rs.As.Ps.
Stamps for Vakalatnama.	2-8-0
Advocate's fee.	281-11-6
Total	284-3-6

(Seal) Sd. S.H. Belavadi.
Deputy Registrar.
The 7th day of July 1950.

True Copy

for Deputy Registrar.

The 3/8/ day of August 1950.